HCJ 7040/15
HCJ 7076/15
HCJ 7077/15
HCJ 7079/15
HCJ 7081/15
HCJ 7082/15
HCJ 7084/15
HCJ 7085/15
HCJ 7087/15
HCJ 7092/15
HCJ 7180/15

Petitioner in HCJ 7040/15 **Fadl Mustafa Fadl Hamed**

Petitioners in HCJ 7076/15
1. **Haj Hamed Abdallah**
2. **Hosni Meshaki**
3. **Ahmed Zoan**
4. **Rushida Bashir**
5. **Maryam Ganem**
6. **Jamal Ziat**
7. **Cooperative Housing Co. of Government Workers**
8. **HaMoked Center for the Defence of the Individual**

Petitioners in HCJ 7077/15:
1. **Zinab Munir Ashak Inaem**
2. **Ali Munir Ashak Inaem**

3. **HaMoked Center for the Defence of the Individual**

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Petitioners in HCJ 7079/15:

1. **Lutfi Rizek**
2. **Rina Rizek**
3. **Dana Lutfi Rizek**
4. **Zaid Lutfi Rizek**
5. **HaMoked Center for the Defence of the Individual**

Petitioners in HCJ 7081/15:

1. **Hadija Ahmed Hassan Amar**
2. **HaMoked Center for the Defence of the Individual**

Petitioners in HCJ 7082/15:

1. **Afef Ahmed Rizek**
2. **Ashraf Fathi Rizek**
3. **Talal Lutfi Rizek**
4. **Nasser Omar Rizek**
5. **Ahmed Omar Rizek**
6. **HaMoked Center for the Defence of the Individual**

Petitioners in HCJ 7084/15:

1. **Hamed Seriah Abd Elmajid Mustafa**
2. **Noeman Salah Jumah Hamed**
3. **HaMoked Center for the Defence of the Individual**

Petitioners in HCJ 7085/15:

1. **Muhamad Haj Hamed**
2. **Hiam Haj Hamed**
3. **Yusrah Haj Hamed**

4. **Abdelrahman Hamed**
5. **HaMoked Center for the Defence of the Individual**

Petitioners in HCJ 7087/15:

1. **Welaa Kussa**
2. **HaMoked Center for the Defence of the Individual**

Petitioners in HCJ 7092/15:

1. **Welaa Alam Kussa**
2. **Mahmoud Zahir Kussa**
3. **HaMoked Center for the Defence of the Individual**

Petitioner in HCJ 7180/15: **Lina Abdelghani**

v.

Respondents in HCJ 7040/15,
HCJ 7076/15 and HCJ 7084/15:

1. **Military Commander in the West Bank**
2. **Legal Advisor for the Judea and Samaria Region**

Respondents in HCJ 7077/15:

1. **Military Commander in the West Bank**
2. **Legal Advisor for the Judea and Samaria Region**
3. **Fadl Elbasha**

Respondent in HCJ 7079/15,
HCJ 7081/15, HCJ 7085/15,
HCJ 7087/15, HCJ 7092/15
and HCJ 7180/15: **IDF Commander in the West Bank**

Requesting to join as

Respondents in HCJ 7081/15:

1. **Almagor – Organization of Victims of Terror in Israel**
2. **Devorah Gonen**
3. **Eliezer Rosenfeld**

For the Petitioner in HCJ 7040/15: Mufid Haj, Adv.

For the Petitioners in HCJ 7076/15: Gabi Lasky, Adv.

For the Petitioners in HCJ 7077/15: Michal Pomerantz, Adv.

For the Petitioners in HCJ 7079/15, HCJ 7085/15, 7180/15: Labib Habib, Adv.

For the Petitioners in HCJ/7081/15, 7082/15: Andre Rosenthal, Adv.

For the Petitioners in HCJ 7092/15: Lea Tsemel, Adv.

For the Respondents in HCJ 7040/15, HCJ 7077/15, HCJ 7081/15, HCJ 7084/15/ HCJ 7180/15: Avinoam Segal-Elad, Adv.

For the Respondents in HCJ 7082/15, HCJ 7087/15, HCJ 7092/15: Yuval Roitman, Adv., Yonathan Zion Mozes

For the Request to Join as Respondents: *Pro Se*

The Supreme Court sitting as High Court of Justice

Before: President M. Naor, Justice H. Melcer, Justice N. Sohlberg

Objection to a Decree Nisi

[1] HCJ 4597/14 *Awawdeh v. Military Commander*

[2] HCJ 5290/14 *Qawasmeh v. Military Commander in the West Bank*

[3] HCJ 8091/14 *HaMoked Center for the Defence of the Individual v. Minister of Defense*

[4] HCJFH 360/15 *HaMoked Center for the Defence of the Individual v. Minister of Defense*

[5] HCJ 5696/09 *Mughrabi v. GOC Home Front Command* (Feb. 15, 2012).

[6] HCJ 5667/91 *Jabarin v. IDF Commander in Judea and Samaria*, IsrSC 46(1) 858 (1992).

[7] HCJFH 2161/96 *Sharif v. GOC Home Front Command*, IsrSC 50(4) 485 (1996).

[8] HCJ 8084/02 *Abbasi v. GOC Home Front Command*, IsrSC 57(2) 55 (2003).

[9] HCJ 9353/08 *Hisham Abu Dheim et al. v. GOC Home Front Command*, (Jan. 5, 2009).

[10] HCJ 6288/03 *Sa'adah v. GOC Home Front Command*, IsrSC 58(2) 289 (2003).

[11] HCJ 8066/14 *Abu Jamal v. GOC Home Front Command*, (Dec. 31, 2014).

[12] HCJ 10467/03 *Sharbati v. GOC Home Front Command*, IsrSC 58(1) 810 (2003).

[13] HCJ 7473/02 *Bahar v. IDF Commander in the West Bank*, IsrSC 56(6) 488 (2002).

[14] HCJ 3363/03 *Baker v. IDF Commander in the West Bank* (Nov. 3, 2003).

[15] HCJ 8262/03 *Abu Selim v. IDF Commander in the West Bank*, IsrSC 57(6) 569 (2003).

[16] HCJ 2/97 *Abu Halaweh v. GOC Home Front Command* (Aug. 11, 1997).

[17] HCJ 8575/03 *Azzadin v. IDF Commander in the West Bank*, IsrSC 58(1) 210 (2003).

[18] HCJ 5839/15 *Cedar v. IDF Commander in the West Bank* (Oct. 15, 2015).

[19] HCJ 6396/96 *Zakin v. Mayor of Beer Sheba*, IsrSC 53(3) 289 (1999).

[20] HCJ 124/09 *Dawiat v. Minister of Defence* (March 18, 2009).

[21] HCJ 358/88 *Association for Civil Rights in Israel v. GOC Central Command*, IsrSC 43(2) 529 (1989).

[22] HCJ 7219/15 *Abu Jamal v. GOC Home Front Command* (Nov. 3, 2015).

[23] HCJ 361/82 *Hamari v. GOC Judea and Samaria*, IsrSC 36(3) 439 (1982).

[24] HCJ 802/89 *Nisman v. IDF Commander in the Gaza Strip*, IsrSC 43(4) 461 (1989).

[25] HCJ 897/86 *Jabber v. GOC Central Command*, IsrSC 41(2) 522 (1987).

[26] HCJ7823/14 *Javis v. GOC Home Front Command* (Dec. 31, 2014).

[27] HCJ 2418/97 *Abu Farah v. IDF Commander in Judea and Samaria*, IsrSC 51(1) 226 (1997).

[28] HCJ 6026/94 *Nazal v. IDF Commander in Judea and Samaria*, IsrSC 48(5) 338 (1994).

[29] HCJ 893/04 *Faraj v. IDF Commander in the West Bank*, IsrSC 58(4) 1 (2004).

[30] HCJ 454/86 *Tamimi v. Military Commander in the West Bank* (Oct. 6,1986).

[31] HCJ 1245/91 *Fukhah v. Military Commander in the West Bank* (Dec. 31,1991).

[32] HCJ 299/90 *Nimmer v. IDF Commander in the West Bank*, IsrSC 45(3) 625 (1991).

[33] HCJ 350/86 *Elzak v. Military Commander in the West Bank* (Dec. 31,1986).

[34] HCJ 542/89 *Aljamal v. IDF Commander in Judea and Samaria* (July 31,1989).

[35] HCJ 1056/89 *Alsheikh v. Minister of Defence* (March 27, 1990).

[36] HCJ 869/90 *Lafrukh v. IDF Commander of the Judea and Samaria Area – Beit El* (May 3, 1990).

[37] HCJ 3567/90 *Sabar v. Minister of Defence* (Dec. 31,1990).

[38] HCJ 3740/90 *Mansour v. IDF Commander in Judea and Samaria* (Jan. 8, 1991).

[39] HCJ 6299/97 *Yassin v. Military Commander in the Judea and Samaria Region* (Dec. 4, 1997).

[40] HCJFH 11043/03 *Sharbati v. GOC Home Front Command* (Jan. 18, 2004).

[41] HCJ 4747/15 *Abu Jamal v. GOC Home Front Command* (July 7, 2015).

[42] HCJ 1730/96 *Salem v. IDF Commander*, IsrSC 50(1) 353 (1996).

[43] HCJ 228/89 *Aljamal v. Minister of Defence*, IsrSC 43(2) 66 (1989).

[44] HCJ 6745/15 *Abu Hashia v. Military Commander in the West Bank* (Dec. 1, 2015).

[45] HCJ 2722/92 *Alamrin v. IDF Commander in the Gaza Strip*, IsrSC 46(3) 693, 699 (1992).

[46] HCJ 2006/97 *Ghanimat v. GOC Central Command*, IsrSC 51(2) 651 (1997).

[47] HCJ 6932/94 *Abu Elrob v. Military Commander in the Judea and Samaria Region* (Feb. 19, 1995).

[48] HCJ 8124/04 *Al-Jaabri v. IDF Commander in the West Bank* (Oct. 12, 2004).

[49] HCJ 4112/90 *Association for Civil Rights in Israel v. GOC Southern Command*, IsrSC 44(4) 626 (1990).

[50] HCJ 769/02 *Public Committee Against Torture in Israel v. Government of Israel*, IsrSC 62(1) 507 (2006).

[51] HCJ 2056/04 *Beit Sourik Village Council v. State of Israel*, IsrSC 58(5) 807 (2004).

[52] CA 7703/10 *Yeshua v. State of Israel – SELA* (June 18, 2014).

[53] HCJ 24/91 *Timro v. IDF Commander in the Gaza Strip*, IsrSC 45(2) 325 (1991).

[54] HCJ 5139/91 *Zakik v. IDF Commander in the West Bank*, IsrSC 46(4) 260 (1992).

[55] HCJ 3301/91 *Bardaiya v. IDF Commander in the West Bank* (Dec. 31,1991).

[56] HCJ 2717/96 *Wafa v. Minister of Defence*, IsrSC 50(2) 848 (1996).

[57] HCJ 7607/05 *Abdullah (Hussein) v. IDF Commander in the West Bank* (Feb. 14, 2005).

[58] HCJ 466/07 *MK Zehava Gal-On, Meretz-Yahad v. Attorney General*, IsrSC 65(2) 1 (2012).

[57] HCJ 434/79 *Sahwill v. Commander of the Judea and Samaria Region*, IsrSC 34(1) 464 (1979).

JUDGMENT

President M. Naor

We have before us a series of petitions filed against forfeiture and demolition orders issued for the homes of Palestinians from the Judea and Samaria area, who are accused or suspected of having committed murderous acts of terror in recent months.

Background

1. Over the past two years, the security situation has deteriorated, both within the territory of Israel and in the Judea and Samaria area. This manifests itself in a constant rise in the incidence of terror attacks against Israeli citizens, including fatal attacks leading to the death and injury of dozens of people (see also: HCJ 4597/14 *Awawdeh v. Military Commander in the West Bank*, [1] para. 2 of my opinion (hereinafter: *Awawdeh*); HCJ 5290/14 *Qawasmeh v. Military Commander in the West Bank* [2], paras. 1-3 *per* Justice Y. Danziger (hereinafter: *Qawasmeh*). In recent weeks, there has been a further significant increase in the incidence of acts of terror. According to the data submitted by the Respondents in their responses, from the Eve of the Jewish New Year and until October 25, 2015, 778 attacks were recorded, in which eleven people were killed and another one hundred or so were wounded. Unfortunately, the wave of terror continues at present, and terror attacks, and attempts to carry out attacks, occur on a daily basis throughout Israel and in the Judea and Samaria area.

2. As part of the general escalation, three serious shooting attacks occurred in recent months, in which Israeli citizens were murdered in cold blood. The details of these attacks, which are the focus of the petitions before us, are as follows: on June 19, 2015, Danny Gonen was murdered by shots from close range in a fatal attack close to the Ein Bubin Spring. Danny's friend, Netanel Hadad, was wounded. According to the Respondents, the terrorist who carried out the attack is Muhammed Husseini Hassan Abu Shahin (hereinafter: Abu Shahin), who confessed to the attack in the course of his police interrogation. According to the Respondents, Abu Shahin's confession is well supported by findings from the scene of the attack, and includes references to details that were not disclosed to the public. In addition, Abu Shahin confessed to the perpetration of a series of additional attacks, including thirteen attempted murders. On this basis, Abu Shahin was charged on August 17, 2015 on twenty-four counts, the first of which was causing the death of Danny Gonen and wounding Netanel Hadad.

3. On June 29, 2015, another fatal shooting attack was carried out, in which Malakhi Rosenfeld was killed and three other people were wounded. According to the Respondents, the terrorists who carried out this attack were members of Hamas from the Judea and Samaria area, named Ma'ed Salah Jumah Hamed (hereinafter: Ma'ed) and Abdullah Munir Salah Ashak (hereinafter: Abdullah). From the interrogation of Abdullah – in the course of which he confessed to the acts and also incriminated Ma'ed – it emerged that he and Ma'ed belonged to a Hamas cell that planned to carry out a shooting attack against Israeli citizens. In this framework, on June 27, 2015, the two of them attempted to carry out a shooting attack against Israeli vehicles, which fortunately ended without harm to life or property. Two days later, Ma'ed and Abdullah met for the purpose of carrying out another shooting attack. The two of them drove towards the village of Maghar, and on the way they spotted an Israeli vehicle in which the victims were driving. When the Israeli vehicle stopped close to the attackers' vehicle, Ma'ed opened the window of the vehicle and fired his Karl Gustav rifle in the direction of the passengers. Malakhi Rosenfeld was killed in the shooting, and three others were wounded. To support the responsibility of Ma'ed and Abdullah for these acts, the Respondents attached Abdullah's police confession to their response, as well as the information filed against him.

4. On October 1, 2015, terrorists carried out another vicious shooting attack in the area of the Beit Furik Junction. In this attack, Na'ama and Eitam Henkin were killed in front of their four young children, who were in the car with them and were left orphaned. According to the

Respondents, three terrorists belonging to Hamas participated in the attack: Harem Lutfi Fathi Rizek (hereinafter: Rizek); Samir Zahir Ibrahim Kussa (hereinafter: Kussa); and Yehieh Muhamed Na'if Abdullah Haj Hamed (hereinafter: Hamed). In their response, the Respondents noted that the three of them had confessed to carrying out the attack, but they did not attach the actual confessions. After a discussion in an oral hearing before us, the confessions were submitted (parts of which were blacked out) to the Court, as well as to the Petitioners. In those confessions, which are consistent with each other, the three described, *inter alia*, their part in the murder and their motives for committing it.

The Forfeiture and Demolition Orders that are the Subjects of these Petitions

5. Due to the severity of the three attacks described above, and the need to deter potential terrorists from perpetrating similar acts, the Military Commander in Judea and Samara (hereinafter: the Military Commander) decided to exercise his power under Regulation 119 of the Defence (Emergency) Regulations 1945 (hereinafter: Defence Regulations) by confiscating and demolishing the homes in which the terrorists lived. Six different buildings in the Judea and Samaria Area are involved.

The eleven petitions before us were filed against the decision of the Military Commander to demolish the said six buildings. Before we describe the petitions, we will sketch out a general picture of the buildings marked for demolition:

(a) **The home of Ma'ed, suspected of the murder of Malakhi Rosenfeld (HCJ 7084/15):** This is a single-story house built on a terrace, situated in Kfar Silwad, north of Ramallah.

(b) The home of Abdullah, accused of the murder of Malakhi Rosenfeld (HCJ 7040/15; HCJ 7077/15; HCJ 7180/15): This is apartment no. 23 situated on the top floor of a residential, eight-story building, in Kfar Silwad, north of Ramallah.

(c) The home of Hamed, a suspect in the murder of the Henkin couple (HCJ 7076/15; HCJ 7085/15): These are the two middle floors of a four-story building, in the Askan Rug'ib district of the city of Nablus.

(d) The home of Rizek, a suspect in the murder of the Henkin couple (HCJ 7079/15; HCJ 7082/15): This is an apartment on the second (middle) floor of a three-story building, in the Arak a-Ti'ah neighborhood of Nablus.

(e) The home of Kussa, a suspect in the murder of the Henkin couple (HCJ 7087/15; HCJ 7092/15): This is an apartment on the ground floor of a building with two stories that are built, and another one in advanced stages of construction, in the Dahi'ah neighborhood of Nablus.

(f) The home of Abu Shahin, a suspect in the murder of Danny Gonen (HCJ 7081/15): This is an apartment on the top floor of a three-story building, in the Qalandia refugee camp.

We will now describe the petitions concerning the six buildings. Note that our discussion of the petitions does not follow the order in which they were filed, but rather, the order in which we decided to address the various issues that arose.

Respondent's decision with respect to the Petitioners in HCJ 7084/15 (*regarding the demolition order for Ma'ed's home*)

6. Ma'ed is a suspect in the murder of Malakhi Rosenfeld. According to the Respondents, he lived in a one-story building constructed on a terrace in Kfar Silwad, north of Ramallah. In this house – which is registered in the name of the father of the family, who is deceased – live the mother and brothers of the suspect, Ma'ed. On October 15, 2015, the Military Commander informed the suspect's family that he intends to confiscate and demolish the entire building, and that if they wish to file an objection, they must do so in writing by Saturday, October 17, 2015. The family filed an objection, which was dismissed on October 19, 2015. On the very same day, the Military Commander signed the forfeiture and demolition order for Ma'ed's home. Three days later, Ma'ed's family petitioned this Court (HCJ 7084/15). The HaMoked Center for the Defence of the Individual, founded by Dr. Lotte Salzberger, filed a petition together with them (hereinafter: HaMoked Defence Center).

Respondent's decision with respect to the Petitioners in HCJ 7040/15, HCJ 7077/15 and HCJ 7180/15 (*regarding the demolition order for Abdullah's home*)

7. Abdullah, accused of the murder of Malakhi Rosenfeld, lived in apartment no. 23, on the top floor of a residential building of eight stories, also located in Kfar Silwad. The apartment is *leased* by the mother of the accused, and his brothers and sister live there as well. On October 15,

2015, the Military Commander notified the family that he intended to confiscate and demolish the said apartment, and that if they wished to file an objection, they must do so by Saturday, October 17, 2015. The Military Commander did not notify the owners of the building and its other residents of his intention to demolish Abdullah's apartment. Nevertheless, together with the objection filed by the family of the accused, objections were also filed on the part of the other residents of the building and on the part of the owner, Mr. Fadl Mustafa Fadl Hamed (hereinafter: the owner of the building), who rented out the apartment marked for demolition to Abdullah's mother. After the three objections were dismissed and the forfeiture and demolition order signed, each of the objectors filed a petition against the order (HCJ 7040/15 – petition of the owner of the building; HCJ 7077/15 – the petition of the family of the accused and HaMoked Defence Center; HCJ 7180/15 – the petition of the residents of the building and HaMoked Defence Center).

Respondent's decision with respect to the Petitioners in HCJ 7076/15 and HCJ 7085/15 (*regarding the demolition order for Hamed's home*)

8. Hamed is a suspect, as stated, in the shooting attack in which the Henkin couple were killed. Hamed's home is in the Askin Rug'ib district of Nablus, in a four-story building. According to the Respondents, Hamed lived on the *two middle floors* of the building. They say that Hamed lived with his parents on the first floor (above the ground floor), whereas the second floor, which is in the final stages of construction, is intended for Hamed's future residence. In any case, it is claimed that of late, Hamed sometimes lived in that apartment as well. On October 15, 2015, the Military Commander notified the family that he intended to confiscate and demolish the *first floor and the second floor*, and that if they wished to file an objection, they must do so in writing by Saturday, October 17, 2015. It should be noted that it was mistakenly written in the Arabic version of the notice that the Military Commander intended to confiscate and demolish the *ground* floor of the building. The suspect's family filed an objection, as did a resident of the ground floor of the building – the brother of the suspect – as well as the residents of the adjacent buildings. In the framework of the decisions on the objections, the Military Commander apologized for the mistake in the Arabic version of the notice, and explained that, as noted in the Hebrew version, the intention was to demolish the first and second floors of the building. Subsequently, the objections of the family members were dismissed. The objections of the neighbor and of the residents of the adjacent buildings were likewise dismissed. Following the dismissal of the objections and after the Military Commander signed the forfeiture and demolition order, the objectors, together with HaMoked

Defence Center, filed petitions in this Court (HCJ 7076/15 – the petition of the resident of the ground floor and the residents of the buildings adjacent to the building marked for demolition; and HCJ 7085/15 – the petition of the family members, including the mother of the suspect, who also owns the building).

Respondent's decision with respect to the Petitioners in HCJ 7079/15 and HCJ 7082/15 (regarding the demolition order for Rizek's home)

9. Rizek, too, is suspected of having participated in the attack in which the Henkin couple were murdered. The apartment in which Rizek lived is in the Arak a-Ti'ah neighborhood of Nablus. This is an apartment on the second (middle) floor of a three-story building, in which Rizek's parents and brothers also live. On October 15, 2015, the Military Commander notified the family that he intended to confiscate and demolish the second floor of the building, and that if they wished to file an objection, they must do so in writing by Saturday, October 17, 2015. The family, as well as other residents of the building, filed two objections – which were dismissed. Immediately subsequent to this, the Military Commander signed the forfeiture and demolition order. Thereafter, the objectors, together with HaMoked Defence Center, filed two petitions in this Court (HCJ 7079/15 – the petition of the family members, and HCJ 7082/15 – the petition of other residents in the building).

Respondent's decision with respect to HCJ 7087/15 and HCJ 7092/15 (regarding the demolition order for Kussa's home)

10. Kussa was the third suspect in the attack in which the Henkin couple were murdered. The apartment in which Kussa lived is in the Dah'ia neighborhood of the city of Nablus. This is an apartment on the *ground floor* of a building of which two floors are built, and the third is in advanced stages of construction. On October 15, 2015 the Military Commander notified the suspect's family that he intended to confiscate and demolish the *ground floor* of the building, and that if they wished to file an objection, they must do so in writing by Saturday, October 17, 2015. Members of the family filed an objection, as did other residents in the building. After the objections were dismissed and the Military Commander signed the forfeiture and demolition order, the objectors, together with HaMoked Defence Center, filed petitions in this Court (HCJ 7087/15 –

the petition of the suspect's wife, who lives with their three children in the apartment marked for demolition; and HCJ 7092/15 – the petition of other residents in the building).

Respondent's decision with respect to the Petitioner in HCJ 7081/15 (regarding the demolition order for Abu Shahin's home)

11. Abu Shahin, who is accused of the murder of Danny Gonen, lived with his family in an apartment on the top floor of a three-story building, in the Qalandia refugee camp. On October 15, 2015, the Military Commander notified the members of the family who lived with the accused and their relatives, members of the Amar family, that he intends to confiscate and demolish the third floor of the building. The notice stated that if they wish to file and objection, they must do so in writing by Saturday, October 17, 2015. An objection filed by the accused's grandmother, Mrs. Hadija Amar, who lives on the first floor of the building, was dismissed on October 19, 2015. On that same day, the Military Commander signed the forfeiture and demolition order for Abu Shahin's home. Three days later, Mrs. Amar, together with HaMoked Defence Center, filed a petition against the order (HCJ 7081/15). In order to complete the picture, it should be noted that according to the Respondents, the apartment marked for demolition is owned by *the uncle of the accused*, Ibrahim Abdullah Amar. Nevertheless, Mrs. Amar claimed that she owns the whole building, including the accused's apartment on the top floor.

The Main Arguments of the Parties

Fundamental Arguments Common to all the Petitions

12. In the petitions before us, several arguments arose that are common to them all. First, according to the Petitioners, demolition of the homes of Palestinian residents in the Judea and Samaria area – in which the laws of belligerent seizure apply – constitutes a violation of international humanitarian law and human rights law. They contend that the destruction of homes is contrary to the prohibition against destroying property except where absolutely necessary for military purposes (Art. 53 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (CA 1, 453 (opened for signature in 1949) (hereinafter: Fourth Geneva Convention); Article 46 of the Fourth Hague Convention concerning the Laws and Customs of War on Land, including the Regulations respecting the Laws and Customs of War on Land (1907) (hereinafter: Hague Regulations), constitutes prohibited collective punishment (Art. 33 of the Fourth Geneva Convention; Reg. 50 of the Hague Regulations), and is contrary to the duty to

ensure the welfare of the child (Art. 38 of the Convention concerning the Rights of the Child, (opened for signature in 1989). Against this background, and based on the opinions of Israeli academic experts in public international law, it was argued that extensive demolition of homes is liable to amount to a war crime under international criminal law and the Rome Statute of the International Criminal Court (1998). The Petitioners are aware of the institutional difficulty in a reexamination of the constitutionality of the policy of demolition of homes that has been approved by the Court over a long period. However, according to them, in view of the serious implications of the policy of demolition of homes, its examination is justified in the framework of the petitions before us.

The Petitioners further argued that even though the justification for demolishing the homes of terrorists is, according to the case law of this Court, deterrent and not punitive, there is no proof that demolishing homes actually serves the purpose of deterring potential terrorists. In this context Petitioners recalled that in 2005, the Minister of Defence accepted the recommendations of the think tank headed by General Udi Shani (hereinafter: the Shani Committee), according to which the demolition of homes should be stopped, in view of doubt as to its effectiveness. The Petitioners argued that it is not acceptable that the Respondents refrain from presenting empirical data or other evidence in support of the claim that demolition of homes deters potential terrorists from carrying out attacks. This, notwithstanding the comments of Justices E. Rubinstein and E. Hayut in HCJ 8091/14 *HaMoked Center for the Defence of the Individual v. Minister of Defense* [3] (hereinafter: the *HaMoked Defence Center* case), according to whom the Respondents ought to conduct "follow-up and research on the matter," and "insofar as possible, should, as may be necessary in the future, present this Court with the data demonstrating the effectiveness of house demolition as a means of deterrence that justifies the infliction of harm to parties who are not suspected nor accused" (*ibid*., para. 27 *per* Justice E. Rubinstein). Another common argument is that of discrimination. According to the Petitioners, Reg. 119 of the Defence Regulations is implemented in a way that discriminates between Jews and Arabs. Whereas the homes of Arabs who perpetrated terror attacks have been demolished, the homes of Jews who carried out similar attacks are still standing. Finally, it was argued that the amount of time that was given to the Petitioners to file objections against the intention to demolish the buildings, and the amount of time given them to petition this Court against the orders that were issued was unreasonably short. Some of the Petitioners also pointed out that the forty-eight hours that they were given to file objections

included days of rest. Moreover, some of the Petitioners argued that there were additional flaws in the hearing process, first and foremost the refusal of the Respondents to allow the Petitioners to examine material on which the decisions were based, such as the incriminating evidence against the suspects and the engineers' reports in accordance with which the demolitions will be carried out.

13. The Respondents argued in reply that all the fundamental arguments should be dismissed. In response to the Petitioners' arguments that rely on international law, the Respondents argued that the Court has decided on a number of occasions, and recently in the *HaMoked Defence Center* case [3], that the demolition of terrorists' homes is a legitimate action that is consistent with international and domestic law. The Respondents argued that the Petitioners showed no reason justifying a reexamination of these arguments. The Respondents also argued that in the present security reality, exercise of the authority under Reg. 119 of the Defence Regulations is essential in order to deter additional, potential attackers. According to them, the question of the effectiveness of the policy of demolition of homes has been addressed in a string of judgments (for example, in the *HaMoked Defence Center* case [3] in which a petition on a question of principle against use of the tool of demolishing the homes of terrorists was dismissed; a petition for a further hearing on that judgment was dismissed today (HCJFH 360/15 *HaMoked Center for the Defence of the Individual v. Minister of Defense* [4] (hereinafter: *HCJFH HaMoked Defence Center*). Indeed, as the Respondents agree, several years ago the Shani Committee recommended restricting the method of home demolitions to the point of non-use, but with the growing wave of terror, the need to use this authority in Jerusalem (as of 2008) and in the Judea and Samaria area (as of 2014) arose once more. The Respondents contend that renewal of use of the measure of demolitions is the result of circumstances of time and place, and as the face of terror changes, the Military Commander is required to act accordingly, changing the measures that he adopts. The Respondents further argued that the policy is implemented proportionately, and that in the framework of the balances that were considered, weight was attributed to the gravity of the deeds; the perpetrator's residential connection to the home; the size of the home; the impact of implementing this measure on other people; engineering considerations, etc. It was also argued that in accordance with the case law of this Court, the claim of discrimination must be dismissed. Finally, it was argued that there is no substance to the Petitioners' arguments regarding the hearing process.

Specific Arguments

14. A number of specific arguments were also raised in the petitions, on which I will elaborate below, in relation to each order that was issued for the homes that are the subjects of the petitions before us. At the same time, we will already note at this stage that the main thrust of the specific arguments relates to the factual foundations on which the Respondents based their decision; to doubts in relation to the rational connection between the means of demolishing homes and the deterrent purpose in certain cases; to the delay in exercising the authority; to the possible harm to adjacent apartments and buildings; and to the question of whether the Respondents must provide compensation for this harm. The Respondents, on their part, argued that these claims, too, must be dismissed, as will be explained below.

The Proceedings in this Court

15. In all these petitions, requests for interim orders were made and granted. In accordance with the interim orders, the Respondents were prohibited from confiscating and demolishing the six dwellings until the petitions were decided.

16. On 27 October 2015, the Almagor Association, an organization for the victims of terror in Israel, together with the mother of Danny Gonen and the father of Malakhi Rosenfeld, asked to be joined as respondents to the petitions. We allowed them to submit their positions in writing, and to present oral arguments during the hearing on the petitions. They asked to express the voice of the grieving families, whose pain needs no elaboration, in support of the demolition of the homes of terrorists which, according to them, is liable to prevent additional victims of terror.

17. A hearing was held before this Court on October 29, 2015. The petitions raise common questions, and some relate to the same buildings. We therefore decided to address them together. Nevertheless, each of the petitions has its own particular aspects, which must be considered separately.

18. At the start of the oral hearing, we asked counsel for the Respondents whether the petitions could be treated as if a decree nisi had been issued. Initially, the Respondents answered in the negative, but after the hearing, they submitted notice that they agreed to this request. Furthermore, with the consent of counsel for the Petitioners, we examined confidential material *ex parte*, which

addressed the deterrent power of the policy of the demolition of homes. At our instruction, a copy of the material was later sent to the Court, to be kept in the Court's vault as part of the exhibits submitted in the present petitions. On November 9, 2015 a request was submitted on the part of the Petitioners to examine the possibility of revealing the confidential material, or at least some of it, to the Petitioners for their examination. The request was also raised in the oral hearing before us (see: transcript of the hearing of October 29, 2015, page 32). We did not find it possible to grant this request.

19. Finally, after necessary clarifications on certain matters, on November 2, 2015 the Respondents submitted a supplementary notice (hereinafter: supplementary notice). In the framework of the supplementary notice, the Respondents argued that in each of the cases that are the subjects of the petitions, the various alternatives for executing the orders were examined (full demolition, demolition of internal walls and ceiling, or sealing the apartment). According to them, this examination revealed that all six structures should be destroyed "due to the full set of relevant circumstances, including engineering, operative and operational considerations, as well as considerations of deterrence." The Respondents further explained that if the adjacent buildings were damaged as a result of *negligent* planning or execution of the demolition of the structures marked for demolition, the State would agree – beyond the letter of the law – to repair the building or to compensate its owners. This would be subject to the opinion of an appraiser and a string of additional conditions, namely: that the defect in the demolition of the building did not result from a disturbance of public order; that the owners of the structure did not receive compensation, restitution or participation of any kind for the damage from the Palestinian Authority or any other body; that the injured party is not a citizen of an enemy state or an activist or member of a terrorist organization or anyone acting on their behalf (in accordance with sec. 5B of the Civil Wrongs (Liability of the State) Law, 5712-1952 (hereinafter: Civil Wrongs Law)).

20. At our request, the Respondents further presented details of the timetables of the execution of earlier demolition orders that had been approved by this Court since 2013. In this framework it emerged that some of the orders were executed immediately after the judgment approving the order was handed down, while some were executed only several months later. One order has not yet been executed, for operational reasons. Additionally, the Respondents attached the following documents to the supplementary notification: the suspects' confession to the murder of the Henkin

couple; the confession of another two people involved in the attack in which Malakhi Rosenfeld was murdered; and a summary of the mapping out of the home of the suspect Hamed.

21. The Petitioners, on their part, submitted responses to the supplementary notice. In their responses, the Petitioners claimed, *inter alia*, that it emerges from the Respondents' notice that alternatives to full demolition were considered only reluctantly. The Petitioners also claimed that the conditions specified by the Respondents for paying compensation to the residents of the adjacent buildings are not reasonable.

Discussion and Decision – Common Arguments

22. The petitions before us turn on the implementation of Regulation 119 of the Defence Regulations, which authorizes the Military Commander to order the demolition of the houses of suspects or persons accused of hostile activity against the State of Israel.

Forfeiture and Demolition of Property etc.	119 (1) A Military Commander may by order direct the forfeiture to the Government of Israel of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, or of any house, structure or land situated in any area, town, village, quarter of street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offence against these Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything growing on the land. Where any house, structure or land has

> been forfeited by order of a Military Commander as above, the Minister of Defence may at any time by order remit the forfeiture in whole or in part and thereupon, to the extent of such remission, the ownership of the house, structure or land and all interests or easements in or over the house, structure or land, shall revest in the persons who would have been entitled to the same if the order of forfeiture had not been made and all charges on the house, structure or land shall revive for the benefit of the persons who would have been entitled thereto if the order or forfeiture had not been made.
>
> […]

23. The ambit of Regulation 119 of the Defence Regulations, as formulated, is very broad. Nevertheless, the case law of this Court has made clear that the Military Commander must use this power in a cautious, limited manner, in accordance with the principles of reasonableness and proportionality (see, e.g., the *Awawdeh* case [1], paras. 16-17 of my opinion; HCJ 5696/09 *Mughrabi v. GOC Home Front Command* [5], para. 12 *per* Justice H. Melcer (hereinafter: *Mughrabi*); HCJ 5667/91 *Jabarin v. IDF Commander in Judea and Samaria* [6]). This case law is reinforced with the enactment of Basic Law: Human Dignity and Liberty, in light of which the Regulation must be interpreted (see HCJFH 2161/96 *Sharif v. Commander of the Home Front* [7], 488 (hereinafter: *Sharif*); HCJ 8084/02 *Abbasi v. GOC Home Front Command* [8], 59). Therefore, according to the rules developed in the case law, the authority must ensure that the demolition is carried out for a proper purpose and that it meets the proportionality test. In other words, the means adopted must rationally lead to the realization of the goal; the means adopted must achieve the goal with the least possible violation of the protected human rights – the right to property and to human dignity; and finally, the means adopted must be appropriately related to the underlying goal

(see: *Sharif* [7], at pp. 60-61; HCJ 9353/08 *Hisham Abu Dheim et al. v. GOC Home Front* Command [9], para. 5 of my opinion, and the references there (hereinafter: *Abu Dheim*)).

24. As the case law has held, the purpose of the Regulation is deterrent, not punitive. This purpose has been recognized as proper (for criticism of this approach, see, e.g., David Kretzmer, *High Court of Justice Review of the Demolition and Sealing of Houses in the Territories*, (1993) KLINGHOFFER MEMORIAL VOLUME ON PUBLIC LAW 305, 314, 319-27 (Heb.); Amichai Cohen and Tal Mimran, *Cost without Benefit in the Housing Demolition Policy: Following HCJ 4597/14 Muhammad Hassan Halil Awawdeh v. Military Commander in the West Bank*, HAMISHPAT ONLINE 5, 11-21 (2014) (Heb.)). Demolition of houses is undoubtedly a drastic, harsh step – primarily due to the harm it causes to the family of the terrorist, who sometimes did not aid him nor know of his plans. Indeed, "[…] the injury to a family member – who has not sinned nor transgressed – when he loses his home and shelter, contrary to first principles, is burdensome. (*HaMoked Defence Center* case [3], para. 2, *per* Justice N. Sohlberg). However, given the deterrent force of the use of the Regulation, there is sometimes no choice but to use it (see, e.g., HCJ 6288/03 *Sa'adah v. GOC Home Front Command* [10], 294). Therefore, the case law of this Court has held that when the acts attributed to the suspect are particularly heinous, this may suffice to justify use of this exceptional sanction of demolishing his home, due to considerations of deterrence (see: HCJ 8066/14 *Abu Jamal v. Commander of the Home Front* [11] para. 9, *per* Justice E. Rubinstein (hereinafter: *Abu Jamal*); HCJ 10467/03 *Sharbati v. GOC Home Front Command* [12], 814 (hereinafter: *Sharbati*)). These cases are all similar to the present cases, which concern cruel attacks in which Israeli citizens were murdered in cold blood. And all of this against the background of a harsh security situation in which, unfortunately, attacks and attempted attacks directed against the citizens and residents of Israel are a daily occurrence.

The Authority of the Military Commander – Compliance of the Policy of Home Demolitions with International Law

25. The Petitioners contend that the Respondents' policy violates international humanitarian law and human rights law. These contentions – which go to the root of the authority of the Military Commander to order the forfeiture and demolition of the homes of protected persons – were recently raised before this Court in the *HaMoked Defence Center* case [3]. This Court did not find

grounds for deviating from the case law on this matter (for elaboration, see: *ibid*., paras. 21 – 24 *per* Justice E. Rubinstein, and para. 3 *per* Justice E. Hayut). As stated, today I handed down a decision denying an application for a further hearing of that case (the above-mentioned HCJFH *HaMoked Defence Center* [4]). In my decision, I noted that a further hearing is intended to address explicit, detailed rulings of the Court, and not questions that the Court did not discuss in depth. I accordingly dismissed the applicants' main argument that a further hearing should be held precisely because this Court refused to re-examine questions that had been decided in the case law concerning the authority of the Military Commander to order the forfeiture and demolition of the homes of terrorists.

26. In view of the judgment of this Court in the *HaMoked Defence Center* case [3], I saw no grounds for revisiting these questions, *inter alia*, considering the fact that this Regulation has been invoked both within the borders of Israel as well as in the area of Judea and Samaria. On this matter, the words of Justice E. Rubinstein in the *HaMoked Defence Center* case bear repeating: "we shall see — with all due respect – that the authority exists, and the main question is that of reasonableness and discretion" (*ibid*., para. 20). Judicial review of the exercise of authority under Regulation 119 of the Defence Regulations must focus on the subject of discretion, which I will now address.

The Effectiveness of the Policy of Demolition of Houses

27. Over the years, Petitioners have often raised the argument that there is no evidence attesting that the demolition of the homes of terrorists has the potential to deter others from perpetrating acts of terror. A similar argument was made in the present petitions. This Court has ruled more than once that the effectiveness of the policy of demolition of houses is a matter for the evaluation of the security establishment, and that in any case it is difficult to conduct a scientific study that would prove how many attacks were prevented as a result of the demolition activity (see, *inter alia*: HCJ 7473/02 *Bahar v. IDF Commander in the West Bank* [13], 490; HCJ 3363/03 *Baker v. IDF Commander in the West Bank* [14]; HCJ 8262/03 *Abu Selim v. IDF Commander in the West Bank* [15], 574-575 (hereinafter: *Abu Selim*); HCJ 2/97 *Abu Halaweh v. GOC Home Front Command* [16] (hereinafter: *Abu Halaweh*).

At the same time, since demolition of houses is, as we have said, a drastic measure – which sometimes violates the basic rights of those who have not been involved in terror – this Court has stressed that the security authorities should periodically examine whether their assessment on this matter is correct and effective (see: HCJ 8575/03 *Azzadin v. IDF Commander in the West Bank* [17], 213). Recently, it was held in the framework of a judgment in the *HaMoked Defence Center* case [3], on which the Respondents rely, that even though, at the time, there were no grounds for intervention in the policy of the Military Commander to order the forfeiture and demolition of the homes of terrorists who perpetrated serious attacks, he should bear in mind that he is under a duty to re-examine the effectiveness of this policy. Justice E. Rubinstein wrote as follows:

> …I believe that the principle of proportionality does not allow us to continue to assume forever that choosing the drastic option of house demolition, or even of house sealing, achieves the desired purpose of deterrence, unless all of the data that properly confirms that hypothesis is presented to us for our review. We accept the premise that it is hard to assess this matter, and this Court has often addressed this problem … However, as aforesaid, I believe that employing means that have considerable consequences for a person's property justifies an ongoing review of the question of whether or not they bear fruit, especially in view of the fact that claims have been made in this regard even among IDF officials, and see, for example, the presentation of the Major General Shani Committee which, on the one hand, presents a consensus among intelligence agencies regarding the benefits thereof, and on the other hand states, under the title "Major Insights" that "within the context of deterrence, the measure of demolition is 'eroded'" … Thus I believe that State authorities must examine the measure and its utility from time to time, including conducting follow-up research on the matter, and insofar as possible should, as may be necessary in the future, present this Court with the data demonstrating the effectiveness of house demolition as a means of deterrence that justifies the infliction of damage upon parties who are not suspects nor accused persons […] In my opinion, the requested

effort would be appropriate in order to meet the basic requirements of Basic Law: Human Dignity and Liberty, the importance of which in the Israeli democratic system requires no elaboration. We are not setting hard-and-fast rules as to the nature of the required research and data. That will become evident, to the extent necessary, at the appropriate time. At present, of course, the engineering issue should be thoroughly examined in respect of each specific demolition or sealing, in order to ensure that the goal is achieved within its boundaries, and without deviation.

Justice E. Hayut concurred, adding:

Finally, I will say that I attach great importance to the comment made by my colleague Justice Rubinstein concerning the need in the future to conduct, from time to time and to the extent possible, follow-up and research concerning the measure of house demolition and its effectiveness … The recent wave of terror that began with the frequent killings and massacres of innocent civilians, passers-by and congregation members at a synagogue, also marked an extreme change, characterized by terrorists from East Jerusalem, required a renewed application of this measure. However, these extreme cases should not obviate the need that was addressed by my colleague to re-examine from time to time, and raise doubts and questions concerning the constitutional validity of home demolition under the tests of the limitation clause. In his poem, "The Place Where We Are Right" the poet Yehuda Amichai lauds the doubts that should always trouble even the hearts of the righteous:

But doubts and loves
Dig up the world
Like a mole, a plow.

And a whisper will be heard in the place

Where the ruined
House once stood

(*ibid*., para. 6) (and see also, recently, the minority opinion of Justice U. Vogelman in HCJ 5839/15 *Cedar v. IDF Commander in the West Bank* [18] (hereinafter: *Cedar*).

28. Against the above background, and mindful that several months have elapsed since the judgment in the *HaMoked Defence Center* case [3], we asked the Respondents at the hearing if there had been any examination of the matter. In answer to our question, the Respondents insisted that they were in possession of classified material that supported their argument concerning the benefit derived from demolition of the homes of terrorists (for a similar claim raised by the State in the past, see, e.g., the *Abu Selim* case [15], at p. 574). With the consent of counsel for the Petitioners, we examined the classified material *ex parte*. I will emphasize that the material that was presented to us does not fall into the category of "research", but rather, it is a collation of information. This information attests to a not insignificant number of cases in which potential terrorists refrained from carrying out attacks due to their fear of the consequences for their homes and those of their family.

29. Having examined the classified material, I am of the opinion that considering the fact that until recently, the number of home demolitions was relatively limited, what was presented to us is sufficient to support the conclusion that there is no cause at this time to intervene in the decision of the Military Commander and the political echelon (that was presented with the material), whereby the demolition of homes indeed constitutes a deterrent factor for potential terrorists, who are afraid of causing harm to their family. As Justice Vogelman noted in the *Cedar* case, "[…] in fact, if the demolition of the home of one terrorist deters another terrorist from harming human life, then we must say that the selected measure has achieved a benefit which may be the noblest of all imaginable benefits" (*ibid.*, para. 3). Accordingly, the material that was presented to us satisfied me that the fear of harm to the homes of the families of the terrorists constitutes a deterrent for potential terrorists. Therefore, despite the doubts that have been expressed of late in the case law and the literature with respect to the deterrent power of house demolition, I see no reason to depart from the case law, according to which there is, in general, no justification for intervening in the decision of the competent authorities to implement this measure. Nevertheless, I will

mention that after studying the material on which the Respondents relied in making their decision, I cannot say that causing damage to a house that is owned by an "outside" third party, who is not a relative of the terrorist and who has no knowledge of his intentions, creates deterrence. The classified material does not lay a foundation for a determination that harm of this kind, too, has a deterrent effect. I will return to this at greater length below.

Claim of Discrimination

30. The Petitioners also argued that the policy of the Military Commander discriminates between Jews and Arabs. This argument should be dismissed. It is well known that the burden of proving a claim of discrimination falls upon the shoulders of the one making the claim. As has been held, this is not a light burden (see: *HaMoked Defence Center* [3], para. 25 *per* Justice E. Rubinstein; see also HCJ 6396/96 *Zakin v. Mayor of Beer Sheba* [19]). The present petitions make a general claim of discrimination, without offering serious support. The Petitioners did not, therefore, present a sufficient factual basis to support their claim, and as such it does not warrant our intervention (see and cf. also: HCJ 124/09 *Dawiat v. Minister of Defence* [20], para. 6 *per* Justice E.E. Levy; *Sharbati* [12], at p. 815; *Qawasmeh* [2], para 30 *per* Justice Y. Danziger).

The Hearing Process

31. The Petitioners further argued that the timetable set for the hearing process in their matter was unreasonable. Some also complained that the material on which the Respondents based their decision, such as the evidentiary material incriminating the suspects and the engineering plans for demolishing the buildings, was not made available for their examination.

32. It is a fundamental principle that an administrative agency may not exercise its authority in a way that may harm a person before that person is given a proper chance to present his arguments. This principle is derived from the conception that an administrative authority must act fairly (see: I. ZAMIR, ADMINISTRATIVE AUTHORITY, vol. 2, 1148 (2nd ed., 2011) (Heb.) (hereinafter: ZAMIR). The rule that a hearing must be held, and the reasons underlying it, also apply to the exercise of authority under Regulation 119 of the Defence Regulations. As such, as this Court has

held in the past, *per* President M. Shamgar, that the exercise of such authority must normally be delayed in order to allow those who will be harmed thereby to make their arguments:

> … it would be appropriate that an order issued under Regulation 119 should include a notice to the effect that the person to whom the order is directed may select a lawyer and address the Military Commander before implementation of the order, within a fixed time period set forth therein, and that, if he so desires, he will be given additional time after that, also fixed, to apply to this Court before the order will be implemented. (HCJ 358/88 *Association for Civil Rights in Israel v. GOC Central Command* [21], 541 (hereinafter: *ACRI* case).

Only in exceptional circumstances that require carrying out the demolition immediately due to military and operational considerations, will there be no postponement until the hearing is held:

> The Respondents do not dispute that there are circumstances – and until now these were apparently the majority of instances – in which, even in their opinion, there is no reason not to permit the making of objections (within a fixed time) before the person who issues the order and also to allow the possibility of postponing its implementation for an additional fixed time (48 hours were mentioned) during which it will be possible to present a petition to the Court requesting the exercise of judicial review over the administrative decision. It is unnecessary to add that it is possible that an interlocutory order will be given, as a result of the application to the Court, and additional time will pass until the actual decision will be given.
>
> However, it is argued, there are situations whose circumstances require on-the-spot action, and in which it is not possible to delay the implementation of the action until the said periods have passed. […]

> According to our legal conception, *it is, therefore, important that the interested party be able to present his objections before the Commander prior to the demolition, to apprise him of facts and considerations of which he may have been unaware* […].
>
> …There are military-operational circumstances in which judicial review is inconsistent with the conditions of time and place or the nature of the circumstances [...].
>
> In my opinion, ways should be found to maintain the right to present one's claim before implementation of a decision which is not among the types of situations [in which immediate demolition is necessary – M.N.] (*ibid*., at pp. 540-541) (emphasis added – M.N.)

In the present case, as part of the hearing process, notices were sent to the family members living in the buildings earmarked for demolition. The notices specified the grounds for the planned forfeiture and demolition of their homes. The notice also explained that they could submit an objection to the Military Commander. *All* the notices concerning the planned demolitions were sent on Thursday, October 15, 2015. The wording of the notices was also essentially the same (with the relevant changes), and the time-tables for submitting objections were identical. For the purpose of illustration, I bring as an example the verbatim wording of one of the notices that were sent (the object of HCJ 7079/15 and HCJ 7082/15):

> The Commander of the IDF forces in Judea and Samaria, by virtue of his authority as the Military Commander in the area of Judea and Samaria, in accordance with Regulation 119 of the Defence (Emergency) Regulations, 1945 and his other powers under any law and security legislation, hereby notifies that it is his intention to render forfeit and demolish the apartment on the middle floor of a three-story building in Shechem […] in which the terrorist Karam Lutfi Fathi Rizek resides […].
>
> This measure is adopted because the above-mentioned acted to carry out a terror attack on October 1, 2015 in the course of which he brought about the death by gunfire of the late Henkin couple […]

> If you wish to present your arguments or objections to this intention, you must specify them in writing […] *by October 17, 2015 at 12:00* […]
>
> Any factual or legal claim that you raise must be supported by documentation and other proofs, which must be attached to your letter to the Military Commander (emphasis added – M.N.).

In my opinion, in the matter at hand, the timetable that was set is problematic. In *all* the present cases, the amount of time given to the Petitioners to submit objections was very short: from Thursday, Oct. 15, 2015 until *Saturday*, Oct. 17, 2015, which included days of rest. Is this a coincidence? I accept that, usually, demolition orders that are issued for the homes of terrorists must be carried out quickly in order to achieve deterrence. Fixing tight schedules is therefore justified. Nevertheless, and despite the urgency, the timetables must be reasonable and fair under the whole set of circumstances (see and *cf*: the *ACRI* case, at pp. 540-541; see also: ZAMIR, at p. 1177). This conclusion is derived from the basic principle that a competent authority has not fulfilled its duty by summoning the relevant person to present his arguments, but rather, it must hold a *fair* hearing process, in a manner that affords the person who will be harmed by the decision a *suitable* opportunity to have his say.

33. I believe that considering the nature of the authority that is exercised and the violation of the human rights of innocent persons that it may cause, a time period of one working day, and sometimes less than that, to submit an objection is not sufficient. Moreover, the haste with which the procedures were conducted caused additional flaws, such as a mistake in the Arabic wording of the notice that was issued for the house in which Hamed lived. Even though the mistake in the wording of the order was technical in nature, and it was later corrected in the framework of the decision on the objections, haste in the conduct of procedures of this type is liable to entail serious mistakes that might, on occasion, be irreversible (for an example of a recent mistake in the identification of the house marked for demolition, see: HCJ 7219/15 *Abu Jamal v. GOC Home Front Command* [22]). Nevertheless, since the Petitioners have had the opportunity to make their arguments before us, and the possibility of supplementing their arguments after the hearing, I do not think that the timetable under discussion in our case ultimately caused a miscarriage of justice (see and *cf*: the *Abu Selim* case [15], at p. 573). Therefore, in my opinion, the timetables do not

justify the extreme relief of voiding the orders. Looking to the future, the Respondents must establish reasonable procedures in regard to the relevant dates, including the amount of time for submitting objections.

34. Several of the Petitioners further argued, as stated, that the Respondents ought to have allowed them to examine the evidentiary material incriminating the relevant suspect, and the engineers' opinions. As I pointed out, the right to be heard that is accorded to the individual must be fair and appropriate. Therefore, in principle, the authorities should see to providing those involved with the contents of the documents on which their decision relies (regarding the general duties of the authority in connection with holding a hearing prior to making a decision, see: ZAMIR, at p. 1173; DAFNA BARAK-EREZ, ADMINISTRATIVE LAW, vol. 1 499 (2010) (Heb). However, there may be circumstances in which this is not possible, for example, for reasons of state security and others (see: *ibid.*, at pp. 506-507). Against this backdrop, the Respondents did well in ultimately submitting to the Petitioners and to the Court those unclassified parts of the confessions of the three suspects in the murder of the Henkin couple, and the confessions of additional persons involved in the murder of Malakhi Rosenfeld. Since the Petitioners were given an opportunity to respond to the contents of this evidence, there are no grounds for intervention in this regard. I will, however, comment that as a rule, the notice of intention to render forfeit and demolish should contain details, albeit minimal, about the evidentiary material that exists against the suspect who lives in the house that is marked for demolition (see and cf. the *ACRI* case [21], at p. 541).

35. In my opinion, there are also no grounds warranting intervention in the refusal of the Respondents to allow the Petitioners to examine the engineers' reports. In the cases before us, in which claims were made about possible damage to the buildings adjacent to the building marked for demolition, the Respondents, in the framework of their decision on the objections and in their responses to the petitions, described the way in which each demolition would be carried out, and explained that an engineer would supervise the demolitions themselves. Hence, the Petitioners were presented with a comprehensive picture of the planned demolitions, and their arguments that the demolition plans remained vague cannot be accepted. In addition, those Petitioners who so wished submitted engineers' opinions of their own. The Respondents must examine these opinions, if they have not already done so, with an open mind. It may be that in the future, in cases in which, *prima facie*, an engineering problem arises (such as a case in which the apartment marked for demolition is the middle floor of a building, or a case in which the apartment marked for

demolition is in a multi-story building that may collapse), it will be appropriate to describe the way in which the demolition is planned already in the framework of the notice of intention to render forfeit and demolish. At the same time, taking account of the entire set of circumstances of the cases at hand, the fact that the Respondents did not hand over the engineers' opinions to the Petitioners does not constitute, in my opinion, grounds for intervening in the Respondents' decision.

And now, from the general issues to the particular questions that arose in the petitions.

Deliberation and Decision – Particular Arguments

Decision in the petition concerning the demolition order issued for the home of Ma'ed (HCJ 7084/15)

36. This petition relates to the forfeiture and demolition order issued for the home of Ma'ed, who together with Abdullah, is suspected of murdering Malakhi Rosenfeld. The suspect's family, who live in a single-story house that is marked for demolition, petitioned against the order. The petition argued, in particular, that the Respondents have no basis for exercising their authority under Regulation 119 of the Defence Regulations. According to the Petitioners, Ma'ed was not arrested by the authorities in Israel and was not questioned by them. Rather, he is held by the Palestinian Authority. In any case, he has not been charged in Israel. In these circumstances, the Petitioners argue that Ma'ed's part in the act attributed to him was not proven. Alternatively, it is claimed that Ma'ed was not a resident of the building marked for demolition. As described in the petition, between the years 2006 and 2010, Ma'ed was in the United States, and after returning from there he married and went to live elsewhere with his wife. In the last year and a half, after divorcing his wife and until his arrest, Ma'ed would come to the house that is the object of the order two or three times a week, but most nights he slept at his workplace. Therefore, the Petitioners request that we order the Respondents to refrain from carrying out the forfeiture and demolition of the building to which the order relates.

37. The Respondents responded that Ma'ed's role in the acts is firmly based on administrative evidence, including Abdullah's confession and the information filed against him. The Respondents also mentioned that they have classified material that also supports Ma'ed's guilt. According to

the Respondents, this evidence constitutes a sufficient evidentiary basis for the purpose of exercising authority under Regulation 119 of the Defence Regulations. As will be recalled, at a later stage, the Respondents attached the confessions of additional persons involved in the shooting attack to the supplementary notice, which link Ma'ed to its perpetration. The Respondents further argued that the facts mentioned by the Petitioners, according to which the suspect slept in the building earmarked for demolition half the week, and that he does not own another apartment, consolidate the required residential link for the purpose of demolishing the building.

38. The particular questions that relate to the decision on this petition are questions of fact. I will discuss them in order. According to the provisions of Regulation 119 of the Defence Regulations, the authority it confers may be exercised in relation to a particular building, if the competent authority becomes aware that a resident of that building has committed an offence of the type specified in the Regulation. In this context it has been held that *administrative* evidence attesting to the fact that an assailant lived in the house marked for demolition suffices (see: *Awawdeh* [1], para. 25 of my opinion; *Sharbati* 12], at p. 815). Indeed, "the military commander does not require a conviction by a judicial instance, and he himself is not a court. From his point of view, the question is whether a reasonable person would regard the material before him as being of sufficient probative value" (HCJ 361/82 *Hamari v. GOC Judea and Samaria* 23], 442; see also: HCJ 802/89 *Nisman v. IDF Commander in the Gaza Strip* [24], 464; HCJ 897/86 *Jabber v. GOC Central Command* [25], 524-525 (hereinafter: *Jabber*); *Mughrabi* [5], para. 14, *per* Justice H. Melcer; HCJ7823/14 *Javis v. GOC Home Front Command* [26], paras. 10-12, *per* Justice E. Rubinstein).

39. In the present case, the Respondents had detailed confessions of Ma'ed's partner, Abdullah, which described Ma'ed's central role in carrying out the attack. They also had the statements of additional persons who were involved in the planning and execution of the shooting attack: the confession of Amjed Hamad, who said that he purchased the weapon for Ma'ed that had been used in carrying out the attack, and added that Ma'ed told him about his involvement in the act, and the confession of Faid Hamed, who took part in organizing the terrorist cell for the attack, and he too provided details of Ma'ed's part in it. On the other hand, *no argument* was raised by the Petitioners relating to the claims of his partner Abdullah or to the claims of the other people involved. In these circumstances, the material that was presented to us is sufficient to serve as an administrative evidentiary basis for the exercise of the authority (see and *cf*: the *Jabber* case [25], at pp. 524-525,

and the references there). In view of the above, in my opinion no weight should be attributed to the fact that Ma'ed is held by the Palestinian authority and has not yet been interrogated in Israel (see and cf.: HCJ 2418/97 *Abu Farah v. IDF Commander in Judea and Samaria* [27]).

40. I also found no substance to the claim that Ma'ed did not live in the building marked for demolition. For the purpose of exercising authority under Regulation 119 of the Defence Regulations, it must be shown that the terrorist was a "resident" or "inhabitant" of the building marked for demolition (see: HCJ 6026/94 *Nazal v. IDF Commander in Judea and Samaria* [28], 343-344 (hereinafter: *Nazal*); HCJ 893/04 *Faraj v. IDF Commander in the West Bank* [29], 6-7 (hereinafter: *Faraj*)). According to the case law, a person's absence from his residence does not necessarily sever the required residential connection. This depends on the nature of the absence and the concrete circumstances of the case (see: *Nazal*, at pp. 343-344). Thus it was found, for example, that a terrorist's residence in a boarding school during his studies did not sever his connection to his parents' home (HCJ 454/86 *Tamimi v. Military Commander in the West Bank* [30]). This also applied in another case in which the terrorist would often come home to change his clothes and stock up on food (HCJ 1245/91 *Fukhah v. Military Commander in the West Bank* [31]; and see also cases in which it was ruled that the absence of a terrorist from his home due to the fact that he was fleeing from the security forces does not sever the residential link: see *Nazal*; *Faraj*). On the other hand, this Court intervened in the decision of the military commander to demolish the home of the terrorist's uncle, because it was found that his father's home was, in fact, the permanent residence of that terrorist (HCJ 299/90 *Nimmer v. IDF Commander in the West Bank* [32], 628). In the present case, there is no dispute that the suspect usually stays part of the week in the family home that is earmarked for demolition, and in any case no convincing evidence was presented attesting that he has any other permanent residence (see and cf: HCJ 350/86 *Elzak v. Military Commander in the West Bank* [33]; *Jabber*, at p. 525). There are, therefore, also no grounds for our intervention in this regard.

Decision in the petitions concerning the demolition order issued for the home of Abdullah (HCJ 7040/15, HCJ 7077/15, HCJ 7180/15)

41. The order that was issued for the home of Abdullah, Ma'ed's partner, relates, as noted, to the apartment on the top floor of an eight-story building in Silwad. Three separate petitions were

submitted against this order. The *first* petition (HCJ 7077/15) was filed by the brother and sister of the accused, who reside in the apartment marked for demolition. That petition specifically argued that the apartment to be demolished is leased from *a third party*, who *is not* related to the family and who also knew nothing of the intentions of the accused. At the hearing before this Court, counsel for the Petitioners added that according to the lease agreement, this is a short-term lease which can be renewed (or terminated) on an annual basis. In view of this, the Petitioners argued that demolition of their home will not be a deterrent to the perpetration of terror attacks, and it must be revoked. In addition, it was argued that there is a defect in exercising the authority some four months after the perpetration of the attack to which the order relates, and that the Respondents must take into consideration the damage that is likely to be caused to adjacent buildings.

42. The *second* petition (HCJ 7040/15) was submitted by the owner of the building who leased the apartment marked for demolition to Abdullah's mother. This petition argued that demolition of the building owned by the Petitioner, *who is a third party with no familial or other relationship to the terrorist or his family*, causes serious damage to his property, amounting to collective punishment, and will entail harm to other innocent inhabitants.

43. The *third* petition (HCJ 7180/15) was submitted by the inhabitants and lessees of a building in which the apartment marked for demolition is situated. In the framework of the petition, the Petitioners complained that they were not given the opportunity to see the engineers' opinions on the basis of which the demolition would be carried out, or the evidence against the accused, and they argued that the Respondents should at least undertake to compensate them if their apartments are damaged as a result of the demolition.

44. In their responses to these three petitions, the Respondents initially argued that the demolition order could be carried out despite the fact that Abdullah's apartment is leased. The Respondents argued that according to the case law, the proprietary status of a terrorist as owner or lessee does not prevent exercise of the authority. The Respondents further argued, from the point of view of proportionality, that they considered the argument that the building is not owned by the accused or his family, but were of the opinion that despite this fact, it was necessary to deter potential terrorists from carrying out attacks. As for the way in which the demolition would be effected, the Respondents explained that it would be done from within the apartment, by means of

drilling and blasting in some of the pillars and external walls. According to the Respondents, the anticipated result is that some of the internal walls in the apartment will be destroyed, and that only the south-eastern part of the apartment will collapse. The Respondents stressed that at the time of the demolition, an engineer will be present on location and will supervise the execution, and that no damage to the adjacent buildings is anticipated as a result of this action. As for the undertaking to compensate the neighbors in advance for incidental damage, the Respondents cited the *Cedar* case [18], which held that it may be possible for the neighbors to sue for compensation, considering the relevant circumstances. In the supplementary notice, the Respondents explained that subject to certain conditions specified above, they agree, beyond the letter of the law, to repair any damage caused to adjacent buildings or to provide compensation therefor. Regarding the passage of time since the perpetration of the attack and until the issuing of the order, the Respondents argued that exercise of the authority under Regulation 119 of the Defence Regulations is determined according to the particulars of time and place, and it is a matter for the discretion of the competent authorities.

45. After considering the arguments of the parties, I have reached the conclusion in regard to the home in which Abdullah lived, that the decree nisi issued in the petition of the owner of the building (HCJ 7040/15) should be made absolute, due to the weak link between the terrorist and his family and the apartment that is marked for demolition, and also due to the lack of a basis for the conclusion that demolition of the home has a potential to deter potential attackers in such circumstances. As stated above, according to the language of Regulation 119 of the Defence Regulations, it is sufficient if the terrorist is a "resident" or "inhabitant" of the house marked for demolition. As a logical outcome of this, the case law has determined that the authority under Regulation 119 of the Defence Regulations may be exercised as long as a "residential link" exists between the terrorist and the house. Hence it was ruled, *inter alia*, that as formulated, the Regulation allows an order to be issued to demolish the house that a terrorist was renting (see HCJ 542/89 *Aljemal v. IDF Commander in Judea and Samaria* [34] (hereinafter: *Aljemal*); see also: HCJ 1056/89 *Alsheikh v. Minister of Defence* [35] (hereinafter: *Alsheikh*); HCJ 869/90 *Lafrukh v.IDF Commander of the Judea and Samaria Area – Beit El* [36] (hereinafter: *Lafrukh*); HCJ 3567/90 *Sabar v. Minister of Defence* [37] (hereinafter: *Sabar*); HCJ 3740/90 *Mansour v. IDF Commander in Judea and Samaria* [38]; *Abu Halaweh* [16]).

46. The authority therefore exists in this case as well. Nevertheless, as is well known, judicial review of the decision of the Respondents does not end at the level of authority. The discretion in exercising the authority must also be examined, in light of the circumstances of the case and taking into account the criteria of proportionality. According to these criteria, there must exist, *inter alia*, a rational connection between the purpose and the measures that are adopted. As explained above, this Court ruled in a number of cases that the purpose of demolishing the homes of terrorists is not to punish their families, but to deter potential terrorists who are liable to refrain from carrying out terror attacks if they know that by perpetrating these acts they are endangering their homes and those of their families. At the same time, I seriously doubt whether, in the circumstances of the present case, demolition of Abdullah's apartment will act as a deterrent to the perpetration of acts of terror. I will explain. As will be recalled, the Respondents presented us with classified information that, in principle, supports the claim of deterrence. However, the classified material contains no indication that the demolition of a house owned by an unrelated third party – *who has no familial or other relationship to the terrorist or his family*, and where almost no economic harm ensues to the terrorist or his family – helps in deterring potential terrorists (and *cf.* the circumstances of the *Awawdeh* case [1], which are different from the present case. There, the terrorist leased an apartment *from his brother*). This, as opposed to evicting the family of the terrorist from the apartment. A judge has only what he sees before him. The most recent decision of this Court in the case of *HaMoked Defence Center* required, as noted, an examination of the effectiveness of deterrence. The material that was submitted to us does not indicate effectiveness in a case such as the one under discussion. Accordingly, the case before us *differs* from other cases that were discussed in the decisions of this Court.

47. What we have said above is inextricably related to the concrete circumstances of the case: the *mother* of the accused Abdullah rented the apartment under an agreement that is renewed annually, and which according to its terms, is due to expire this coming September. The agreement was submitted in Arabic, and we had it translated. According to the agreement, the family paid for the house one year in advance, and no more than that. In such circumstances, most of the damage caused by the demolition will fall on the lessor, and not on the accused and his family. Therefore, it would seem that the assumption that carrying out the demolition in this case will deter potential terrorists is problematic. Moreover, I seriously doubt whether it can be assumed – with no basis in any material – that a lessor who is an outsider has any influence over the decisions of a terrorist.

One way or another, the Respondents also did not argue that demolishing the home of a third party is liable to incentivize lessors to take steps that will deter their tenants from carrying out acts of terror.

48. Thus, in the present case, the Respondents did not show a rational connection between the deterrent purpose and demolishing the house that is the subject of the petition. Furthermore, in accordance with the criteria of proportionality, it must be established that a proper relationship exists between the benefit of the measure that is adopted and the harm (the criterion of proportionality "*stricto sensu*"). In this framework, a balance must be struck between "[…] the gravity of the terrorist act and the scope of the sanction, between the anticipated harm to the family of the assailant and the need to deter future, potential assailants; between the basic right of every person to his property and the right and duty of the government to maintain security and public order" (HCJ 6299/97 *Yassin v. Military Commander in the Judea and Samaria Region* [39], para. 13, *per* President A. Barak; See also: Yoram Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing Off of Houses* 29 ISR. Y.B. HUM. RTS. 285, 297 (1999)). When doing so, the residential link of the terrorist and the building, as well as the effect on other people of exercising the authority, must be weighed. In view of these criteria, in all the past cases dealing with the demolition of premises rented from a third person, the competent authorities adopted the sanction of sealing off, rather than demolishing the house. It should be emphasized that sealing off is *reversible*, and it may be cancelled in the course of time, in view of the provision at the end of Regulation 119(1) that allows for remission (see in particular the cases of *Aljemal*; *Alsheikh*; *Lafrukh*; *Sabar*; *Mansour*; *Abu Hilweh*; *cf*. the measure of sealing off with concrete adopted in other cases (that did not involve rental): HCJFH 11043/03 *Sharbati v. GOC Home Front Command* [40]). In our case, beyond the fact that there is no rational connection between *demolishing* the apartment and the deterrent purpose, the required deterrence can be achieved by evicting the family from the apartment and sealing it off for a limited period. Indeed, in the present case, the owner of the building suggested, on his own initiative, to evict the family of the terrorist from the apartment, and even agreed to it being sealed off for a certain period (see: the response of the Petitioner in HCJ 7040/15 of Nov. 5, 2015). The Respondents, on their part, objected to the Petitioner's proposal. They argued that alternatives to demolition had been examined, but were not practical. The Respondents' handling of this issue is generalized, and contains no explanation of why – in a case in which the main harm will be caused to a third party

who is not in any way connected to the terrorist who has little connection to the building – it would be justified to adopt the extreme sanction of demolition.

49. Therefore, in my opinion, we should order that the demolition order issued in regard to Abdullah's home be rescinded, while requiring the Petitioner in HCJ 7040/15 to carry out his proposal to evict the family of the accused from the apartment by Nov. 17, 2015 at 12:00. The Respondents argued that sealing off is not possible, and therefore it is sufficient to evict the family from the apartment. I would stress that my intention is not to determine that it will not be possible to adopt the measure of demolition in every case in which a terrorist lives in a rental apartment. My conclusion is limited to the concrete circumstances of the case, in which this measure, in the whole set of circumstances that were described, cannot be regarded as proportionate.

50. As for the argument of delay raised by the family of the accused in their petition (HCJ 7077/15), recently, this Court ruled in the *Cedar* case that, in principle, the date for carrying out the demolition of terrorists' homes is a matter for the discretion of the competent authorities (see and *cf.* also: HCJ 4747/15 *Abu Jamal v. GOC Home Front Command* [41]). Nevertheless, a decision on this matter, too, is subject to the familiar criteria of reasonableness and proportionality (*Cedar* [18], para. 7, *per* Deputy President E. Rubinstein). In practice for the present case, the forfeiture and demolition order that is the subject of the petition was issued – according to its wording – "because the inhabitant of the house, Abdullah Munir Salah Ashak […] murdered, on June 29, 2016, the late Malakhi Rosenfeld and wounded three others." However, the precise timing of the execution of the order derives from the circumstances of time and place i.e., the recent rise in the number of attacks (see: decision of the Respondents to the objection of the Petitioners of Oct. 19, 2015). On this basis, it can be determined that the decision to demolish was made as a direct result of the perpetration of the attack by Abdullah, taking into account the grave security situation and the need for deterrence. In my opinion, there is nothing wrong with this (but *cf.*: the dissent of Justice U. Vogelman in the *Cedar* case; dissent of Justice D. Dorner in HCJ 1730/96 *Salem v. IDF Commander* [42] 364 (hereinafter: *Salem*)). Indeed, as a rule, notice of the intention to render forfeit and demolish a house should be given close to the time of the attack (see: *Cedar*, para. 7 *per* Deputy President E. Rubinstein). However, considering the whole set of circumstances, including the fact that the information against Abdullah was filed on Aug. 17, 2015, the argument of delay is not relevant here (and see also: *Cedar* (in which the notice of the intention to demolish

was given some seven months after the attack occurred); *Salem* (after the passage of four months); *Alsheikh* (five months); HCJ 228/89 *Aljemal v. Minister of Defence* [43], (in which over a year elapsed between the time of the attack and the issuing of the order); I will mention that in HCJ 6745/15 *Abu Hashia v. Military Commander in the West Bank* [44], a decree nisi was recently issued in a petition concerning a demolition order that was issued about eleven months after the attack (Deputy President E. Rubinstein and Justices Z. Zylbertal and M. Mazuz, decision of Oct. 29, 2015))[1].

In their petition, the family of the accused also raised an argument concerning the damage that was liable to be caused to the adjacent apartments. Having held, as explained above, that intervention the Respondents' decision in this case is justified, this argument no longer has any bearing. The same applies to the petition of the neighbors (HCJ 7180/15), which also focused on the damage likely to be caused to buildings adjacent to the apartment marked for demolition. I would emphasize that these petitions, *per se*, should be denied. But granting the petition of the owner of the building (HCJ 7040/15) has practical implications for these petitions.

Decision in the petitions concerning the demolition order issued for the home of Hamed (HCJ 7076/15 and HCJ 7085/15)

51. In the case of Hamed, the suspect in the murder of the Henkin couple, a forfeiture and demolition order was issued for the *two middle floors* of a four-story building in the area of Askan Rujib in the city of Nablus. As will be recalled, two petitions were filed against the order. The *first* petition (HCJ 7085/15) was filed by the family of the suspect who live together on the floors marked for demolition. In the framework of this petition, the Petitioners argued that the suspicions against the three people involved – Kussa, Rizek and Hamed – had not yet been proven. According to them, as long as their interrogation was not complete and no charges had been filed or decision rendered in relation to any of the three in court, there is no justification for ordering the demolition of their homes. In addition, the Petitioners argued that Hamed is renting the second floor from his mother, Petitioner 2, and that for this reason too, there should be no demolition. Alternatively, the Petitioners argued that the intention of the Respondents to destroy two apartments that are situated on two different floors, when the suspect did *not* live on the floor on which the Petitioners lived,

[1] The decree nisi in HCJ 6745/15 was made absolute on Dec. 1, 2015 – ed.

renders the decision disproportionate. Alternatively, the Petitioners asked that we order the Respondents to refrain from carrying out the demolition by means of blowing up the house.

52. The *second* petition (HCJ 7076/15) was filed by the suspect's brother, who lives with his family on the ground floor of the building that is the object of the order, and by the owners of the properties adjacent to the building. This petition argued, on the basis of the engineers' opinion attached to it, that the planned demolition will cause structural damages to the adjacent building. Finally, the Petitioners contended that the formulation of the order in Arabic was flawed in that it said that the Respondents' intention was to demolish the ground floor, whereas the Hebrew version referred to the first and second stories of the building.

53. In response, the Respondents claimed that they are in possession of information indicating the involvement of Hamed in carrying out the attack to which the order relates. Later, after being asked to do so, the Respondents attached the confessions of the suspects in the Henkin murders, including the confession of the suspect Hamed, to the supplementary notice. To ground the residential connection of the suspect to the two stories of the building, the Respondents attached a document entitled "Summary of the Mapping of the House of the Terrorist Yehieh Haj-Hamed in Askan Rujib in Nablus Oct. 6, 2015" (hereinafter: mapping summary) to the supplementary notice. According to this document, the suspect's family lived on the first floor, whereas the second floor belonged to the suspect himself and is in the final stages of construction. According to the Respondents, in these circumstances there is justification for demolishing the two stories of the building. As for the question of safety and the method of demolition, the Respondents noted that the demolition plan had been prepared by professionals who are qualified engineers, with an attempt to prevent, insofar as possible, damage to the adjacent buildings or to parts of the building that are not marked for demolition. As for the method of demolition, the Respondents explained that use would be made of controlled explosions, e.g., small explosive charges, in order to create a shock that would render the stories unusable. The Respondents further stressed that at the time of the demolition, an engineer would be present, supervising all the stages, and in any case, it is not expected to cause structural damage. In their response, the Respondents did not refer to the argument of the Petitioners in HCJ 7076/15 that the Respondents should undertake to compensate the Petitioners for incidental damage caused to their apartments as a result of the demolition. However, in the supplementary notice, the Respondents noted, as stated, that if adjacent buildings

are damaged as a result of negligent planning or execution of the demolition of the building, the State agrees, beyond the letter of the law, to repair the building or to compensate its owners, subject to the terms specified in the notice.

54. In their responses to the supplementary notice, the Petitioners complained, *inter alia*, that the mapping summary was not made available for them prior to the date set for filing the objection. They also pointed out substantive differences between the description of facts in the response and the description of facts in the mapping summary. Thus, for example, whereas the Respondents wrote that the suspect Hamed often sleeps in his new apartment (on the second floor), in the mapping summary this fact was not mentioned. In view of this, the Petitioners argued that no weight should be attributed to this document, and in any case, it cannot be considered credible, convincing evidence. It was also argued that "[…] the fact that the suspect would stay in the apartment of his family and his parents below part of the time is only natural and understandable, and it does not negate his residence in his apartment above […]."Accordingly, the Petitioners asked that we order the Respondents, at very least, to refrain from demolishing the first floor, in which the family of the suspect lives.

55. After considering the arguments of the Petitioners on the one hand, and those of the Respondents on the other, my opinion is that there are no grounds for our intervention in the decision of the Respondents to render forfeit and demolish the two floors in which Hamed lived. I will first address the factual basis. The Respondents were in possession of detailed confessions of the three suspects in the murder of the Henkin couple, each of which was consistent with the others. In accordance with the criteria laid down in the case law, which I discussed earlier, these confessions constitute a sufficient evidentiary basis. Even the Petitioners did not really dispute this, even though they were given an opportunity to raise arguments on this matter. Therefore, there is an evidentiary basis for exercising the Respondents' authority in the said case. As for the Petitioners' argument according to which Hamed lived only on the second floor of the building, in my opinion, the mapping done by the Respondents, which relied on a survey of the premises and questioning of the family by the ISA coordinator, is sufficient in order to determine Hamed's connection to both floors (see and *cf.*: *Mughrabi* [5], paras. 17-19 *per* Justice H. Melcer). Therefore, there are no grounds for our intervention in this regard, as well.

The Petitioners also objected to the process of issuing the forfeiture and demolition order, and emphasized the mistake in the wording of the order in Arabic. As was noted earlier, there was indeed a mistake in the order in Arabic. This mistake resulted from the haste in the process of issuing the orders. Let me emphasize once more that the Respondents must be meticulous in their conduct of a fair process, and in giving all those involved a proper opportunity to make their arguments. At the same time, once the said error in the wording of the order was corrected, there is no flaw that would justify ordering the cancellation of the forfeiture and demolition order.

In the present case, the argument about rental, too, cannot be accepted, in my opinion. Unlike the case of HCJ 7040/15 – in which, in my opinion, the forfeiture and demolition order should be revoked for the reason that the lessor there was an "unrelated" third party – in the present case, the apartment was leased from a family member, namely, the suspect's mother. As for deterrence, there is no real difference between a case in which the terrorist lives with members of his family in a property owned by them, and a case in which the terrorist rents a property from a family member. In both cases, the economic harm to the family of the terrorist is significant. Hence, a potential terrorist's awareness of the possibility that his apartment or the apartment of *his family* will be demolished is liable to deter him from carrying out terror attacks.

56. And now *to the claim for compensation*. As stated above, over the years this Court has narrowed the scope of Regulation 119 of the Defence Regulations, and held that the competent authorities must exercise reasonable discretion in its implementation. As will be recalled, we ruled that according to the material before us, and correct as of this time, the demolition of homes has the potential for creating deterrence. However, the demolition must still be proportionate. In this framework, there are different considerations that the competent authorities must take into account before deciding to exercise their authority. *Inter alia*, they must establish whether it is possible to demolish the residential unit of the terrorist without damaging other parts of the building or neighboring buildings, but "if it emerges that this is not possible, then settling for sealing off the relevant unit must be considered" (*Salem* [42], at p. 360). Thus, the damage that is liable to be caused to adjacent properties is among the relevant considerations regarding the demolition of a particular property. The reason for this is that incidental damage to innocent persons impacts on the proportionality of the demolition. As was stated in the *Alamrin* case:

> … it is inconceivable that the military commander should decide to destroy a complete multi-story house, which contains many apartments belonging to different families, merely for the reason that a person suspected of a terrorist act lives in a room in one of the apartments, and if nonetheless he should want to do this, this court could have its say and intervene in the matter. (HCJ 2722/92 *Alamrin v. IDF Commander in the Gaza Strip* [45], 699).

In view of these principles, the Respondents must fulfill their obligation to ensure that there is professional supervision of the execution of the demolition, and consider the opinion submitted by the Petitioners with an open mind. In the present case, too, the Respondents made it clear that a qualified engineer would supervise the demolition, and that they do not wish to cause structural damage to adjacent buildings. These undertakings of the Respondents are appropriate, and care must be taken to fulfill them. However, this does not exhaust the Respondents' duty to act with proportionality. When innocent third parties, who are not related to the terrorist and did not know of his intentions, are liable to be harmed by the demolition, I would recommend to my colleagues that the demolition should be conditional upon repairing incidental damage or compensating for it, even if such damage is not the result of negligence on the part of the Respondents. I will explain.

57. In the framework of the criteria of proportionality, we must be satisfied that the relationship between the proper purpose of the measure adopted and the violation of rights caused as a result of its use is proper (proportionality "*stricto sensu*"). This is a value-oriented criterion that is based on a balance between competing values and interests. Above, I discussed the serious harm that may be caused by the measure of demolition of homes to those who have done nothing wrong. This harm is all the more serious when it is caused to innocent third parties who are not connected to the terrorist, and whose only crime is their proximity to his place of residence. In my opinion, bearing in mind the need to balance the benefit gained against the harm it causes, the demolition ought to be conditional upon the repair of or compensation for harm caused to innocent third parties. Without this condition, we cannot say that the demolition is proportionate. In the past, the State did indeed undertake to repair incidental damage or pay compensation for it. Thus, for example, the State undertook to repair damage caused to floors adjacent to the floor marked for demolition (HCJ 2006/97 *Ghanimat v. GOC Central Command* [46], 653). In other cases, the State promised that if, despite efforts to prevent damage to adjacent buildings during the demolition,

such damage is caused, compensation will be paid to those affected (see: *Salem*, at p. 363; HCJ 6932/94 *Abu Elrob v. Military Commander of the Area of Judea and Samaria* [47]; see also: HCJ 8124/04 *Al-Jabari v. IDF Commander in the West Bank* [48] (undertaking of the State to refrain from demolition if the adjoining floor would be damaged); see and *cf*. also: HCJ 4112/90 *Association for Civil Rights in Israel v. GOC Southern Command* [49], 631 (undertaking of the State to compensate owners of property damaged due to military needs)). In effect, in our case too, the Respondents do not strenuously oppose the repair of or compensation for incidental damage, but they attach several conditions to which the Petitioners objected in their responses to the supplementary notice. According to the Respondents, they are required to repair or compensate for damages caused by the demolition only in the event that the planning or execution were *negligent***,** and subject to the opinion of an appraiser on their behalf and to a string of additional conditions: the flaw in the demolition of the building did not result from disturbances of the peace; the owners of the building did not receive compensation, restitution or any form of participation in the damage from the Palestinian Authority or from another body; the injured party is not a national of an enemy state nor active in or a member of a terrorist organization, or anyone on their behalf (sec. 5B of the Civil Damages Law).

58. In my opinion, there is generally no room for limiting in advance the duty of the Respondents to pay compensation to third parties who are not relatives of the terrorist to cases of negligence in planning or execution or other conditions. On the contrary, the default position must be that compensation will be paid or damage repaired (on the need to compensate innocent parties even when the action was lawful, see and cf.: HCJ 769/02 *Public Committee Against Torture in Israel v. Government of Israel* [50], 573 (hereinafter: *Public Committee Against Torture*); HCJ 2056/04 *Beit Sourik Village Council v. State of* Israel [51], 831 (hereinafter: *Beit Sourik*); on the obligation to pay compensation for breach of a constitutional right in general, see: CA 7703/10 *Yeshua v. State of Israel – SELA Administration* [52], paras. 20-34 of my opinion). I do not rule out the possibility that, in exceptional circumstances, the Respondents will not be required to pay compensation. However, as stated, I do not think that the exceptional cases in which the Respondents will be exempt from doing so should be determined in advance. I am not unaware of the recent judgment of this Court in the case of *Qawasmeh* [2], whereby the obligation to pay compensation is hypothetical as long as no damage has actually been caused:

> In addition, I did not find it appropriate to discuss the Petitioners' request that the Respondent would undertake to compensate the injured parties should the demolition cause damage to adjacent properties. This is a hypothetical argument which should be heard, if at all, only in the event such damage is caused as aforesaid, and by the competent instances. (*ibid*., para. 11 *per* Justice Y. Danziger).

Indeed, it is only natural that if no incidental damage is caused as a result of the demolition, no duty of compensation to innocent parties will arise. At the same time, however, in my opinion it is important to clarify already at this stage – and I do not believe that this contradicts what was said in the *Qawasmeh* case – that the rule must be compensation or repair, and only in exceptional cases will it be justified to refrain from doing so. Ultimately, minimization of the damage that is caused as a result of the demolition to persons who are not connected to the terrorist, whether by way of compensation for the damage caused to their property or whether by some other means such as repairing the damage that was caused, is essential for compliance with the requirement of proportionality. This, as we have said, also applies in a case in which the Respondents acted lawfully and within their area of competence (see and cf.: *Public Committee Against Torture* [50], at p. 573). Similarly, even when the Military Commander seizes land for a military purpose, he is required to pay compensation (on this see, e.g.: *Beit Sourik*, at p. 831; HCJ 24/91 *Timro v. IDF Commander in the Gaza Strip* [53], 335; see also: Eyal Zamir, *State Lands in Judea and Samaria – Legal Survey*, 12 *MEHKEREI YERUSHALAYIM LE-HEKER YISRAEL* 12 (1985) (Heb.). This is even more essential if the Respondents were negligent in the planning or execution of the demolition. In any case, it is clear that when the owner of an adjacent property can claim negligence on the part of the State, the door is open for an action in torts (see: *Cedar*, para. 9 *per* Deputy President E. Rubinstein; *Qawasmeh*, para. 11 *per* Justice Y. Danziger; see and *cf*., regarding damage cause to property inside the property that is the object of the demolition: HCJ 5139/91 *Zakik v. IDF Commander in the West Bank* [54], 263-264; HCJ 3301/91 *Bardaiya v. IDF Commander in the West Bank* [55]).

59. Therefore, in my opinion, we should not intervene in the demolition decision, but we should hold that if damage is caused, the Respondents must repair it or compensate the injured parties who are not family members of the terrorist, subject to their right to apply to a competent

court for a declaratory judgment that they are exempt from doing so in the circumstances of the case.

Decision in the petitions concerning the demolition order issued for the home of Rizek (HCJ 7079/15 and HCJ 7082/15)

60. In the case of Rizek, the partner of Hamed and Kussa, an order was issued in regard to the apartment in which he lived together with members of his family. This was, as will be recalled, an apartment on the second floor of a three-story building. As aforesaid, two petitions were filed against this order. The *first* petition (HCJ 7079/15) was filed by members of Rizek's family, whereas the *second* petition (HCJ 7082/15) was brought by neighbors and inhabitants of buildings adjacent to the apartment marked for demolition. Similar to Hamed's case, these petitions also argued that the suspicions against the three persons involved, including Rizek, had *not yet been proven*, and that the Respondents should have given the Petitioners the evidentiary material on which the order under discussion was based. This argument must be dismissed. As in the case of Hamed, in Rizek's case, too, the Respondents were in possession of a detailed confession that constitutes a sufficient evidentiary basis for exercising the authority.

61. In addition, it was argued – based on an opinion submitted by the Petitioners – that demolition of Rizek's apartment was liable to cause structural damage to the apartments in the building and to adjacent buildings. The Respondents, on their part, insisted upon the method of demolition, explaining that this would be done by means of drilling and blasting inside the apartment and in the walls on the northern and western faces of the building, and by means of breaching charges that would be activated on the north face. All this, in order to prevent damage to the other apartments in the building and the adjacent buildings. The Respondents further declared that it was anticipated that the demolition method described would allow for the destruction only of the external walls (other than the preserved faces) and the interior dividing walls of the apartment, without causing structural damage to the adjacent buildings and to the other floors of the building. As I mentioned in regard to the other petitions, we noted these undertakings of the Respondents, which are appropriate. Therefore, these petitions should be denied.

Decision in the petitions concerning the demolition order issued for the home of Kussa (HCJ 7087/15 and HCJ 7092/15)

62. In the case of Kussa – Hamed and Rizek's partner – a forfeiture and demolition order was issued for the apartment in which he lived with members of his family. This is an apartment on the ground floor of a three-story building. Two petitions were filed against this order, too. The *first* petition (HCJ 7087/15) was filed by Kussa's wife, who lives in the apartment marked for demolition. Similar to the petitions of the other suspects in the murders of the Henkin couple, this petition, too, argues that the suspicions against the three, including Kussa, are unfounded. Like my rulings in the matter of Hamed and Rizek, here, too, the argument regarding the evidentiary basis should be dismissed, inasmuch as the Respondents had Kussa's detailed confession to the deed, which constitutes a sufficient evidentiary basis for exercising their authority.

The *second* petition (HCJ 7092/15) was filed by the suspect's sister-in-law, who lives on the *second* floor, and his brother, who lives on the *third* floor. In this petition, the Petitioners argue that they have a vested right to know how the Respondents intend to carry out the demolition, and if their apartments are expected to be damaged as a result. It is further argued that the Military Commander does not have the authority to employ the sanction of demolition in Area A. The Petitioners therefore asked, *inter alia*, that we order the Respondents to undertake to refrain from causing any direct harm or damage to the Petitioners' residence.

63. These arguments by the Petitioners should be dismissed. First, we should stress that the Respondents cannot be obligated in advance to refrain from causing damage to the building, as this would effectively mean preventing the demolition. Neither have I found substance in the Petitioners' arguments concerning the authority of the Military Commander in Area A. According to the Israeli-Palestinian Interim Agreement in the West Bank and the Gaza Strip (hereinafter: Interim Agreement), the authority over internal security and public order in Area A were, indeed, transferred to the Palestinian Authority. However, the Agreement also explicitly specified that Israel would continue to carry responsibility for defense against external threats and for the overall security of Israelis in the area of Judea, Samaria and Gaza, and for this purpose it would have "all the powers to take the steps necessary to meet this responsibility" (sec. XII(1) of the Interim Agreement). This means that Israel is authorized to continue operating in Area A when this is required for general security. Therefore, the competence of the Respondents to implement Regulation 119 of the Defence Regulations in this area is consistent with the provisions of the Interim Agreement (see: *Qawasmeh*, para. 28 *per* Justice Y. Danziger; see also: Joel Singer, *The*

Israeli-Palestinian Interim Agreement Concerning Self-Government Arrangements in the West Bank and in the Gaza Strip – Several Legal Aspects, 27 MISHPATIM 605, 622 (1996) (Heb.)).

64. Moreover, after the Interim Agreement was signed, the Military Commander issued a special order for the implementation of the Agreement – "Proclamation on Implementation of the Interim Agreement (Judea and Samaria) (no. 7) 5756-1995" (hereinafter: Proclamation). This Court ruled that the Proclamation, and not the Interim Agreement, is the prevailing law in the Area, and the provisions of the Interim Agreement apply only if they were adopted in the Proclamation:

> […] the Proclamation is the law. It determines who has the authority and what is the authority with respect to a particular matter in any particular area. The Proclamation – and not the Interim Agreement. The Interim Agreement is the historical source of the Proclamation, but it is not its source of validity. Therefore, even if there is a difference between the provisions of the Proclamation and those of the Interim Agreement, and even if they are contradictory, the provisions of the Proclamation prevail. The provisions of the Interim Agreement are part of the law that applies in Judea and Samaria only if they are adopted, and to the extent that they are adopted, by the Proclamation (HCJ 2717/96 *Wafa v. Minister of Defence* [56], 853).

The Proclamation states, *inter alia*, that the law that applied in the Area on the day that it entered into force will remain in force as long as it is not repealed, changed or suspended in accordance with its provisions (see: sec. 7 of the Proclamation; HCJ 7607/05 *Abdullah (Hussein) v. IDF Commander in the West Bank* [57], para. 7, *per* President A. Barak). Regulation 119 was not repealed, and it therefore remained in force even after the Proclamation entered into force. The Proclamation further provided that the decision of the Military Commander that certain powers and areas of responsibility remain in his hands is "conclusive and final" (sec. 6 of the Proclamation). From the provisions of the Proclamation it emerges, therefore, that the Military Commander may operate in Area A, particularly when this is required for the sake of maintaining security, as in our case. In view of the aforesaid, this petition, too, must be denied.

Decision in the petition concerning the demolition order issued for the home of Abu Shahin (HCJ 7081/15)

65. This petition, as will be recalled, concerns the demolition order issued for the house of Abu Shahin, who is accused of the murder of Danny Gonen. The apartment is on the top floor of a three-story building. The Petitioner, a relative of the accused who claims ownership of the apartment marked for demolition, raised several specific arguments: first, the Petitioner argued, on the basis of an engineer's opinion brought on her behalf, that carrying out the demolition is liable to damage the adjacent apartments in the building. Therefore, the Petitioner asked that we order the Respondents to refrain from carrying out the planned demolition. In addition, the Petitioner argued that there had been administrative delay, in that the power was exercised some four months after the date on which the relevant attack was carried out. Finally, the Petitioner mentioned that the accused and his family only hold the status of lessees in the apartment marked for demolition.

66. The Respondents argued in response that in view of the fact that the acts of terror had not ceased, the need for general deterrence remained as it had been at the time of perpetration of the attack that was the subject of the order. The Respondents argued that decisions regarding the implementation of Regulation 119 of the Defence Regulations are made in accordance with the particular circumstances of time and place, and there are, therefore, no grounds for intervention in the current order. Regarding the argument about the accused and his family being tenants in the apartment marked for demolition, the Respondents reiterated their position whereby that fact does not constitute a bar to demolition. As for the question of the safety and the manner of demolition of the building, the Respondents noted that due to the location of the apartment within the apartment block, it was decided that demolition would be by way of controlled explosive demolition, and that an engineer would be present during the demolition and would supervise its execution. In the supplementary notice, the Respondents added that various possible alternatives had been examined and found unsuitable.

67. After examining the arguments of the parties, there are no grounds, in my opinion, for intervening in this case either. The Petitioners argued that there was a delay in issuing the forfeiture and demolition order. In this case, the forfeiture and demolition order that is the subject of this

petition was issued – *as it states* – "because the inhabitant of the house Muhammed Abu Shahin […] murdered Danny Gonen in cold blood by means of pistol fire, and wounded another person […]." Together with this, the exact timing of executing the order derives from the circumstances of time and place, i.e., the recent rise in the number of attacks (see: the decision of the Respondents on the objection of the Petitioner of Oct. 19, 2015)). Therefore, similar to my above ruling in relation to the timing of the issuing of the order in the case of Abdullah, in the present case, too, the decision regarding demolition was made as a direct result of the perpetration of the attack, taking into account the difficult security situation and the need for general deterrence. As I have already mentioned, notice of intention to render forfeit and demolish a house should, as a rule, be given close to the time of the attack (see: *Cedar*, para. 7 *per* Deputy President E. Rubinstein). Nevertheless, considering the entire set of circumstances of the matter, including the fact that the information against Abu Shahin was also filed on Aug. 18, 2015, the argument of delay cannot be accepted in this case. Neither can the argument about tenancy be accepted, in my opinion. This case is similar to the circumstances of HCJ 7085/5 which is before us, dealing with an apartment leased from a family member. The present case, as will be recalled, treats of a building that the accused leased from a relative (whether it was the accused's grandfather, as the Petitioners claim, or his uncle, as the Respondents claim). As I mentioned above, in this case there are no grounds for our intervention.

68. Regarding the question of safety and the manner of demolition of the building, as will be recalled, the order refers only to the top floor of a three-story building. In the framework of the decision on the Petitioner's objection, the Respondents explained that the plan for demolition of the apartment was drawn up by qualified engineers, "after carrying out an accurate mapping of the apartment and taking into consideration the engineering features and its location." This was done "bearing in mind the need to avoid, insofar as possible, damaging neighboring buildings or parts of buildings that are not marked for demolition, i.e. the lower floors of the building." In addition, the Respondents declared that the demolition would be carried out under the supervision of an engineer, who would ensure that all measures were taken to prevent incidental damage. As I pointed out, these undertakings are justified, and care must be taken to fulfill them. In these circumstances, I am of the opinion that there are no grounds for ruling that the planned demolition is not proportionate.

In Conclusion

69. If my opinion is accepted, the petitions before us should be denied, except for the petition of the owner of the eight-story building in Kfar Silwad (HCJ 7040/15). That petition is granted, subject to the owner ensuring that the family of the accused leave the apartment by Nov. 17, 2015 at midday. In addition, the Respondents must act in accordance with the principles that we have laid down in the judgment concerning the mode of conduct of the hearing process and its fairness, and concerning the repair of damage that is liable to be caused to third parties as a result of the demolition, or providing compensation for such damage.

70. Under the circumstances, there will be no order for costs.

Justice N. Sohlberg

I concur in both the principles and the particulars of the judgment of my colleague President M. Naor. I would add three marginal comments on the effectiveness of the policy of demolishing homes, on the claim of discrimination between Palestinians and Jews, and on the application of international law.

1. (a) On the *effectiveness of the policy of demolishing homes*: As is well known, this Court's conception of the exercise of authority under Regulation 119 is that it is underpinned by a *deterrent* purpose – and not a *punitive* one. As a consequence of this conception, it must be assumed that implementation of the Regulation indeed deters potential assailants, thus saving human life. However, deterrence, by its nature, is not something that can easily be quantified, if at all. In the past, the prevalent view on this Court was that it is not possible to prove this matter definitively, and therefore the State was not required to establish a factual basis in order to exercise the authority. Justice E. Goldberg ruled as follows in HCJ 2006/97 *Ghanimat v. GOC Central Command* [46], 655:

> No scientific research has been conducted, nor can be conducted, to prove how many attacks have been prevented and how many souls saved as a result of the deterrent activities of sealing houses and

> demolishing them. From my point of view, however, in order for me not to intervene in the discretion of the Military Commander it is sufficient that the view that there is a certain degree of deterrence cannot be discounted.

In this spirit, several judgments held that the State cannot be expected to prove the effectiveness of the demolition of homes as a deterrent in a scientific, empirical fashion – as the Petitioners ask – and the professional position of the relevant security agencies that it is capable of deterring is sufficient in order for this Court not to intervene in its discretion (see: *Abu Dahim*, para. 11; *Awadeh*, para. 24; *Qawasmeh*, para 25).

(b) Recently, doubts have again arisen, both in this Court and in the legal literature, concerning the correctness of this approach. According to one argument, since this is an extreme sanction that seriously infringes the fundamental rights of those who were not actually involved in terrorist acts, it may be applied only when it is based on a firm factual foundation, in accordance with the standard requirements of administrative law. And since the burden of proof in this matter falls on the governmental authority, and this authority is not able to raise this burden, it must completely refrain from exercising the authority (see Amihai Cohen and Tal Mimran, *Cost Without Benefit in the Policy of Home Demolitions: In the Wake of HCJ 4597/14 Muhammed Hassan Halil Awawdeh v. Military Commander in the West Bank*, HAMISHPAT ONLINE 1,3,5,14 (2014) (Heb.)).

(c) This argument cannot be accepted. An authority must often make difficult decisions, even when there is uncertainty about all their ramifications. In many situations, these matters are not amenable to scientific proof, and they rely on the wisdom and professional discretion of the competent authorities. Should one take away this power, one is – in practice – neutralizing the ability of the state authorities to confront new challenges (cf. Yoav Dotan, *Two Concepts of Reasonableness*, SHAMGAR VOLUME – ARTICLES, pt. 1, 417, 461 (2003) (Heb.)). This applies in general, and it also applies, unfortunately, when basic human rights and human life are placed on the opposite sides of the scales.

In this context, the words of my colleague Justice H. Melcer, addressing the precautionary principle, are apt:

> … the precautionary principle was designed to deal with the difficulty of the gap between the existing knowledge at a given time and the enormous and uncertain potential harm that was liable to be caused by an activity, if appropriate precautionary measures were not adopted in relation to that activity. From the outset, the principle allows the authority (the legislature or the executive) to adopt measures designed to prevent the catastrophe when a significant threat of irreversible, wide-spread damage exists, even if the probability is low and even when there is no proven scientific certainty that the damage will indeed eventuate. (HCJ 466/07 *MK Zehava Gal-On, Meretz-Yahad v. Attorney General* [58]).

This is applicable to the present case as well.

(d) In the circumstances of the present case, I agree with the President's assessment regarding the collection of confidential material that was shown to us – the work of experienced professionals, who are well acquainted with the trends of the society in which the terrorists move – which provides reassurance that fear of damage to the homes of relatives of the terrorists creates deterrence among potential terrorists.

(e) Questions about the effectiveness of the measure of demolition as a means of deterrence have also been raised in this Court (see: *Cedar*, para. 3, *per* Justice U. Vogelman, and the opposing comments of Justice Y. Amit; *HaMoked Defence Center*, para. 6, *per* Justice E. Hayut and paras. 5-14 of my opinion). These judgments noted, based on an examination of the research on this subject, how difficult it is to measure the effectiveness of deterrence. However, when we are dealing with a measure that entails extreme harm to the most basic of property rights – a person's home – this Court has stressed the need for follow-up, for collecting and processing data that relates to the demolition of terrorists' homes and its consequences ("another 'measured step'", in the words of my colleague the President in para. 6 of her decision handed down today in HCJFH *HaMoked Defence Center*, relying on the words of Deputy President E. Rubinstein and Justice E. Hayut in the *HaMoked Defence Center* case). At the same time, mention must be made of the true, genuine difficulty of the professional bodies in basing their expert position on empirical grounds.

A study of the sparse academic literature on this subject (on which I elaborated in the *HaMoked Defence Center* case) shows that such an analysis might yield real operative conclusions only if it is done from a long-term perspective, using tools from the statistical-empirical field of research. Academic research that examines terror from the perspective of various disciplines reveals the difficulty involved in collecting data that proves or disproves deterrence, as well as the difficulty in isolating the effect of a specific aspect – such as the use of house demolitions – from an array of aspects of counter-terrorism. Needless to say, this does not detract from the state's duty to collect data and analyze it to the best of its ability, and also to review its policy on this subject in light of this data. However, it cannot be asked to carry out comprehensive academic research, as the Petitioners demand. In addition, the establishing of a factual basis can certainly not be expected solely on the basis of the relatively few demolitions that were carried out in the short time since the judgment in the *HaMoked Defence Center* case was handed down.

(f) However, since the argument of the factual foundation was raised here, we will mention that from a review of the academic research dealing directly with this subject, it is evident that the position that regards house demolitions as a deterrent is well grounded. In the *HaMoked Defence Center* case, I referred to the research of Efraim Benmelech, Esteban F. Flor and Claude Berrebi, *Counter-Suicide-Terrorism: Evidence from House Demolitions*, which was published in an academic journal (77 J. OF POLITICS 27-43 (2015)) after that judgment was handed down. This research is limited to the effect of house demolitions on attempted suicide attacks during the period of the Second Intifada. The study reveals a clear effect, from a statistical perspective, of a decline in the number of attempted suicide attacks in the geographical areas in which demolitions were carried out, for a short period of approximately one month, until the deterrent effect dissipated. It would appear that no empirical statistical study not based on assumptions and conjecture alone but on the analysis of the data has been conducted that arrives at conclusions that are contrary to this recent research (and see, in greater detail, what I wrote in the *HaMoked Defence Center* case, paras. 5-14; and Justice Hayut, *ibid.*, para. 5). Even if the deterrent effect of house demolitions is limited from the perspective of time and place, it is sufficient that we are saving one life by virtue of the demolition in order for the demolition to be worthwhile, despite the suffering that it involves for the relatives of the terrorist.

(g) Moreover, the deterrence is not designed to act solely on the terrorist's mindset, but also to dissuade the potential terrorist from carrying out his plan by means of the intervention of his relatives: "In traditional Palestinian society, the family holds a central place in the life of the suicide bomber and makes a decisive contribution to shaping his personality and the degree of his willingness to sacrificing his life in the name of his religion or on behalf his people" (Emanuel Gross, *The Struggle of a Democracy against the Terror of Suicide Bombers – Is the Free World Equipped with Moral and Legal Tools for this Struggle?* DALIA DORNER VOLUME 219, 246 (2009) (Heb.) [English: *The Struggle of a Democracy against the Terror of Suicide Bombers: Ideological and Legal Aspects*, 22 WISCONSON INT. L.J. 595, 636]). Gross demonstrates and points out there that the support of family, and its public manifestation, help the terrorist organization: "they expand the circle of supporters of the organization among the Palestinian population, and thus increase their ability to enlist additional suicide bombers in the future.." The deterrence helps to neutralize the family element in promoting terrorism, and to motivate the family unit to act to limit it. Concern about demolition of its home is intended to recruit the family of the potential terrorist to use its influence in the desired direction, to dissuade it from putting a close circle of support at the potential terrorist's disposal, and thus to deflect him from getting involved in terror or carrying it out. For good reason, in the framework of this decision we granted the petition in HCJ 7040/15 to prevent the demolition of a house owned by an uninvolved third party, an owner who has no familial or other connection to the person accused of murder in one of the attacks, nor with his family who lived in the apartment, other than the lessor-lessee connection by virtue of a contract with the mother. This differed from the other petitions, which we decided to deny, in which the family connection was present. Deterrence contributes – so we were convinced – even if only a little. This little bit of deterrence, in our time and place, is liable to be a decisive factor between good and evil.

2. On the claim of *discrimination between Palestinians and Jews*: This claim must be dismissed, as stated by the President in para. 30 of her opinion. The reason that Regulation 119 has not been used in relation to Jews lies in the fact that in the Jewish sector, there is no need for that societal deterrence that is the purpose of the demolitions. The Jewish public, in general, is deterred and steadfast, and is not incited. True, it is undeniable that there are attacks by Jews against Arabs. The enforcement authorities, and the courts, are certainly required to apply the full

force of the criminal law in these cases as well. This applies to the shocking murder of Muhammed Abu Hadid, not to mention the horrific murder of the Dawabsheh family, the full details of which are unknown. But the difference is greater than the similarity in many aspects, and mainly, in our context, in relation to the surroundings: decisive, assertive censure across the board in the Jewish sector – which is not the case on the other side.

3. (a) *On the application of international law*: It is only fitting to mention that international law, in its classical sense, deals with inter-state relations in times of war. The way in which the State of Israel, as well as other states in the Western world, deal with the phenomenon of terror raises legal and moral questions for which it is hard to find solutions in the classical treaties of international law (and see: HILLY MOODRICK-EVEN KHEN, TERROR AND INTERNATIONAL HUMANITARIAN LAW, 16 (2010)). As Justice Hayut wrote in the *HaMoked Defence Center* case:

> However, it seems that in the area of counterterrorism, both international law and domestic Israeli law have yet to catch up with reality, and have yet to establish a comprehensive, detailed code of legal measures that a state may employ in fulfillment of its aforesaid obligation to protect itself and its citizens. Needless to say, this area desperately requires regulation. since the known law by which the nations of the world act is largely adapted to the traditional, familiar model of war between armies, whereas the new, horrific reality created by terrorist organizations and individuals who carry out terror attacks in Israel and around the world, disregards territorial borders and draws no distinction between times of war and times of peace. Thus, any time is the right time to spread destruction, violence and fear, usually without discriminating between soldiers and civilians. In fact, terrorism does not respect any of the rules of the game established by the old world in the laws of war, and this reality also requires that jurists, and not only the security forces, rethink the subject in order to update these laws and adapt them to the new reality. (*ibid.*, para.2).

Indeed, when acts of terror do not distinguish between a soldier and a citizen and between a time of war and a time of peace; when every person, at the front or behind the lines, is a target; when every instrument can become an effective weapon, and sadly, the assailants turn their plowshares into swords and their pruning-hooks into spears (*cf.*: Isaiah 2:4; 54:17) – the expectation that the state will continue to adhere to dichotomous distinctions created by international law is liable to tie its hands in its war on terror, and threaten the security of its citizens (and see: MOODRICK-EVEN KHEN, p. 109*ff.*).

(b) The situation at present directly impacts on the interpretation of international law. We cannot interpret the international treaties that the State of Israel has ratified in dissociation from the concrete aspect of the war on terror in which we unfortunately find ourselves, and without taking into consideration the moral dilemmas that are unique to it on the one hand, and the security needs to which it gives rise on the other. This matter, too, was discussed in the *HaMoked Defence Center* case, where Deputy President E. Rubinstein wrote as follows (para. 22):

> … the 1949 Geneva Conventions, and the preceding 1907 Hague Regulations, were designed and signed at a period that is different to our own. The terrorism with which the world must contend, the State of Israel being no exception, presents complicated challenges since the terrorist organizations do not abide by these or other conventions … the humanitarian provisions of the Hague Convention (IV), which were assumed by Israel despite the fact that it did not recognize the application of the Convention from a legal perspective …. are to be construed in a manner that will preserve their spirit and realize their underlying purposes, while concurrently permitting the State of Israel to protect the security of its residents in the most basic sense of the word.

I can only concur in these words, and hope that the sages and scholars of international law will continue to develop the jurisprudential aspects that are unique to the situation of combat between sovereign states and terrorist organizations, and regulate this area by striking a suitable

balance between humanitarian protection of human rights on the one hand, and maintaining the capability of states to fight the terrorist organizations effectively, on the other hand.

Justice H. Melcer

1. I concur in the comprehensive, well-considered and (factually and legally) precise judgment of my colleague President M. Naor. I also agree with the incisive comments of my colleague Justice N. Sohlberg.

I will, nevertheless, permit myself a few comments in order to clarify my position.

2. The subject of forfeiture and demolition of property under Regulation 119 of the Defence Regulations is within the competence and the discretion of the *Military Commander*. In these matters, he consults with the Israel Security Agency, and he is subject – from the point of view of domestic constitutional law – to the authority of the political echelons under the provisions of Basic Law: The Army. Hence, responsibility for implementation of the Regulation, or for its non-implementation, lies wholly with the above actors, and this Court's review of them is legal only.

3. Regulation 119 in its present formulation was enacted (in its English version) and introduced into the law of our State and the law of the Judea and Samaria region during the British Mandate, pursuant to Article 6 of the Palestine (Defence) Order-in-Council 1937, and it has remained in force to this day. For a review of the sources of the Regulation and its history, see: Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE JOURNAL OF INTERNATIONAL LAW 1, 9-8. 15-18 (1994) (hereinafter: Simon).

It emerges that during the Mandate period, recourse to the Regulation (and to what preceded it) was relatively frequent, when the need arose in times of terror attacks and activity (see: Simon, *ibid.*; Brigadier General Uri Shoham, *The Principle of Legality and the Israeli Military Government in the Territories*, 153 MILITARY LAW REVIEW 253, 259-260 (Summer, 1996) (now our colleague, Justice U. Shoham).

After the Establishment of the State of Israel and until 1979, forfeiture and demolition orders, insofar as they were issued under the Regulation, were not reviewed by this Court. Things

began to change, in the sense of judicial review of the orders, in 1979, with the rendering of the judgment in HCJ 434/79 *Sahwill v. Commander of the Judea and Samaria Region* [57], and this change contributed to an understanding on the part of the international community of the need to use this measure in exceptional cases. Nevertheless, doubts have arisen over the years with respect to the effectiveness of the deterrence achieved by this measure, and there has been growing criticism in Israel and abroad against the demolition of homes in reaction to acts of terror (some of the articles that have been published on this subject were cited in the opinion of my colleague the President, and of my colleague Justice Sohlberg, and see also: Simon).

4. Over time, and particularly in light of the aforesaid at the end of para. 3, administrative law was applied to this area, and the IDF, too, initiated a study of the subject by means of the Shani Committee. Following the study, the practice of implementing Regulation 119 was stopped for a number of years, and the possibility of resorting to it remained in force only for extremely exceptional cases and situations, which unfortunately exist at present.

At the same time, this Court – bearing in mind the developments in Israeli public law and in international law (which has not yet specifically addressed the subject in cases such as those that are confronting us) – has seen fit to limit the possibility of implementing Regulation 119 on three principal planes:

(a) Application of the rules of administrative law to the process, as aforesaid.

(b) Limiting the grounds for forfeiture and demolition of homes to the homes of the terrorist who perpetrated the terror attack, and of his family (therefore, *inter alia*, we granted the petition of the owner of the building who, beyond leasing out the apartment to the assailant and his family, with no awareness of the intentions of the terrorist, was not involved in any other way in the attack).

Moreover, Justice E. Hayut emphasized in the *HaMoked Defence Center* case that in her view, if the terrorist's family members whose home is about to be demolished succeed in convincing the authorities, with sufficient administrative evidence, that prior to the perpetration of the attack, they tried to dissuade the assailant from doing so, then this fact ought to be accorded extremely significant weight that may, in relevant cases, overturn the decision to destroy the home of those relatives. I accept this approach.

(c) Adding the remedy of compensation for uninvolved, innocent victims, insofar as harm is caused to them as a result of carrying out the demolition and under the conditions enumerated in the judgment of the President.

5. In view of the aforesaid at the end of para. 4(b), during the hearing I repeatedly asked counsel for the Petitioners who were family members if they had attempted to dissuade the assailant before he carried out his plans. Their answer was that they did not know of his plans, and therefore they could not dissuade him. I therefore persisted and asked if, in retrospect, the relatives condemn acts such as these (which is likely to contribute to deterrence), but this question remained hanging in the air, and even in their subsequent written responses, they did not address this matter, which begs an explanation.

6. Counsel for the Petitioners argued, *inter alia*, that their clients were not given a proper opportunity to express their arguments in the framework of the rules of administrative law that apply here, as stated in para. 4(a) above, for on the one hand, the Respondents delayed the issuing of the orders for many months after the terrorist acts that are the subject of the petition (so that deterrence is not relevant, even according to the Respondents), and on the other hand they were given only 48 hours (including Friday and Saturday) to submit their written response to the Military Commander. Moreover, they contended that the argument of deterrence is groundless, for in the past, judgments that denied petitions concerning demolition of homes were not carried out for several months.

We therefore asked the State Attorney's Department to submit to us details of the petitions that were denied in these contexts, their causes, the dates of the judgments and of the execution of the demolitions (if at all).

From the table submitted by the Department, we indeed see that sometimes, for political and security reasons, including operational situation assessments, there were delays in carrying out the demolition orders in relation to which the petitions were denied, and one order has not yet been carried out. Moreover, there was a delay even in issuing the orders that are the subjects of the petitions. Therefore, limiting the time of the hearing to 48 hours (which included Friday and Saturday) was indeed not the right thing to do, and as a result of the haste, there were also errors in the formulation of the orders, as described in the opinion of the President. Moreover, in the recent *Abu Jamal* case, there was even a mistake in identifying the house that was marked for

demolition, and were it not for the process of judicial review before this Court, there would have been an irreversible error in that case.

This flaw of excessive limitation relating to the time of the hearing was, in fact, corrected in the circumstances, for counsel for the Petitioners succeeded, at the end of the day, in submitting their arguments, and extensive hearings were also held in this Court. However, in future, the directives of the President in this context, as formulated in her opinion, must be followed strictly.

7. As for the arguments of discrimination in relation to use of Regulation 119 in regard to Jews as opposed to Palestinians, I would comment that beyond raising the argument, data to support the argument of such discrimination was not submitted to us. However, I would like to note that if we should, Heaven forbid, reach a situation that would also require such deterrence vis-à-vis the families of Jewish terrorists or of minorities who are residents of Israel – in principle, they should be subject to the same law.

8. Finally, I find it appropriate to recall the moving, emotional words spoken in the course of the hearing by the mother of Danny Gonen, Mrs. Deborah Gonen, and by the father of Malakhi Rosenfeld, Mr. Eliezer Rosenfeld. Beyond a description of their loved ones who were murdered, cut down in the prime of their lives, and beyond the illustration of the heavy loss suffered by their families and the Jewish people, they sought to support the orders that were issued by the Military Commander, not for reasons of revenge, but for the purpose of deterrence – so that others would not be harmed like their children and they were.

In this context I find it appropriate to express the hope, alongside sincere condolences extended to them and to other families of victims, that their said wish will be realized, that innocents will no longer be harmed, and that we return to the days and the situation in which deterrence will no longer be necessary.

Decided in accordance with the opinion of President M. Naor

Decided this 30th day of Heshvan 5776 (Nov. 12, 2015).

(Corrected this 3rd day of Kislev 5776 (Nov. 15, 2015)).